Petition

81-1565

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No. 81-....

IN THE

Supreme Court of the United States

October Term, 1981

VSL CORPORATION,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit

PETITION OF VSL CORPORATION

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Petitioner VSL Corporation (hereinafter "VSL") respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Tenth Circuit entered on August 18, 1981 as to which rehearing and rehearing *en banc* were denied by order entered January 5, 1982.

QUESTIONS PRESENTED FOR REVIEW

1. When a criminal defendant, such as VSL, is charged under the same federal statute with taking part in what the government contends, and VSL denies, are several separate conspiracies, and has already suffered jeopardy as to one alleged conspiracy, does the burden of proving that there were in fact separate offenses shift to the government when, as here, the defendant makes a non-frivolous showing that there was only one conspiracy?

2. Was it error for the courts below to evaluate VSL's double jeopardy motion under the "same evidence" test?

3. Multiple jeopardy apart, did the government, by prosecuting VSL five times for the same course of conduct, requiring it to defend simultaneously in four different judicial districts, violate the Due Process Clause of the United States Constitution?

PARTIES BELOW

All parties to the proceedings in the Court of Appeals for the Tenth Circuit sought to be reviewed by this Petition appear in the caption hereof.[1]

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[1]VSL is wholly owned by Losinger, Ltd., a Swiss corporation. VSL has no active subsidiaries or affiliates doing business in the United States.

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VSL CORPORATION,

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PETITION OF VSL CORPORATION

OPINION BELOW

The unreported opinion of the Court of Appeals for the Tenth Circuit affirming the district court's denial of VSL's motion to dismiss the indictment is Appendix "A" to this Petition. A copy of the Court of Appeals' January 5, 1982 Order denying VSL's petition for a rehearing and suggestion for rehearing *en banc* is Appendix "B".

The district court did not prepare an opinion upon its denial of VSL's motion to dismiss the indictment. A copy of a portion of the transcript containing the court's oral ruling is Appendix "C".

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on August 18, 1981. VSL's request for a rehearing and suggestion for rehearing *en banc* was denied on January 5, 1982. This Petition is filed within 60 days

of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) and the authority of *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034 (1977).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment of the United States Constitution provides in relevant part:

> "[No person shall] be subject for the same offense to be twice put in jeopardy of life or limb . . . nor be deprived of life, liberty or property, without due process of law . . . ."

STATEMENT OF THE CASE

VSL is a company engaged in the engineering and marketing of post-tensioning technology and materials to construction contractors and builders. Post-tensioning is an engineering process by which high tensile steel strand is stressed at construction sites to add structural strength to concrete buildings.

Between November 1979 and February 1980, the Antitrust Division of the Department of Justice indicted VSL five times in four different districts across the country. Each indictment, in virtually identical language, alleges the same course of conduct; a conspiracy among VSL and other post-tensioning companies to allocate post-tensioning jobs in violation of Section 1 of the Sherman Act, 15 U.S.C. §1. The alleged co-conspirators substantially overlap and the five indictments allege dates of conspiratorial activity which also overlap. Each of the five cases has been, or is being,

prosecuted by the Los Angeles Field Office of the Antitrust Division.[2]

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[2]The five indictments are summarized as follows:

(1) *U.S. v. Prescon Corp., et al.*, U.S.D.C. No. 80-49-ZLW (D. Colo.) [Rocky Mountain States conspiracy indictment, referred to herein as the "Denver" action]

On February 21, 1980, the indictment below was returned in Denver, Colorado against VSL and two other post-tensioning companies, *viz.*, Prescon Corp. ("Prescon") and Atlas Prestressing Corp. ("Atlas"). In addition to the three corporate defendants, four individual defendants are named in this indictment, including VSL's President and Vice-President. In substance, the indictment charges the defendants with a continuing conspiracy to allocate commercial post-tensioning projects in the "Rocky Mountain States" from January 1975 until November 1977 in violation of Section 1 of the Sherman Act. The indictment is Appendix "D".

Status: Trial has been stayed pending VSL's *Abney* appeal of the denial of its motion to dismiss on double jeopardy and due process grounds.

(2) *U.S. v. Atlas Prestressing Corp., et al.*, U.S.D.C. No. 80-76-CR-CA (S.D. Fla.) [Florida conspiracy indictment, referred to herein as the "Miami" action]

On February 22, 1980, VSL and Atlas were indicted in Miami, Florida, along with two individual defendants, on a charge of conspiring to allocate commercial post-tensioning projects in the State of Florida, in violation of Section 1 of the Sherman Act. The government identified Prescon and Western Concrete Structures Co., Inc., ("Western") as unindicted co-conspirators with defendants VSL and Atlas. The conspiracy allegedly began in 1970 and continued into 1976.

Status: VSL was acquitted following a jury trial on May 12, 1980.

The indictment in the Miami action is Appendix "E" hereto. A copy of the judgment of acquittal is Appendix "G".

(3) *U.S. v. Western Concrete Structures Co., Inc., et al.*, U.S.D.C. No. CR 80-114-DWW (C.D.Cal.) [Southwest conspiracy indictment, referred to herein as the "Los Angeles" action]

On February 7, 1980, the government indicted VSL, Prescon and Western in Los Angeles, together with five individual defendants, including VSL's President and Vice-President. The government identified Atlas as an unindicted co-conspirator. Like the other indictments, this indictment charged the defendants with a continuing conspiracy to allocate commercial post-tensioning projects, in the Southwest United States, defined as Southern California, Arizona and Clark County, Nevada, in violation of Section 1 of the Sherman Act. This conspiracy allegedly commenced in May 1974 and continued into 1976.

(footnote continued on following page)

The indictment in this case was returned in the District of Colorado on February 21, 1980. In essence, it alleges that VSL, Prescon Corp. and Atlas Prestressing Corp., together with four individual defendants, engaged in a conspiracy to allocate post-tensioning jobs in the "Rocky Mountain" states, which the indictment defines as Colorado, Utah, Wyoming, New Mexico, Montana, North Dakota, South Dakota, Kansas, Nebraska and Missouri.

On April 14, 1980, VSL filed a motion to dismiss the indictment below or, alternatively, for an election, on the grounds that the multiple indictments violated the double jeopardy and due process clauses of the United States Con-

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Status: VSL and its two officers entered *nolo contendere* pleas June 1980.

The indictment in the Los Angeles action is Appendix "F" hereto.

(4) *U.S. v. VSL Corp., et al.*, U.S.D.C. No. CR 79-913-IH (C.D. Cal.) ["Bridge Market" conspiracy indictment]

On November 8, 1976 VSL and five other post-tensioning companies along with six individual defendants, including VSL's President and Vice-President, were indicted for conspiracy to allocate state highway bridge post-tensioning projects in California, Arizona and Nevada, in violation of Section 1 of the Sherman Act. The indictment alleged that this conspiracy began in 1970 and continued until "at least December 20, 1974."

Status: VSL and its two officers entered *nolo* pleas to this indictment in June 1980.

This is one of two indictments returned in Los Angeles. In order to prevent confusion, this indictment is referred to herein as the "Bridge" action. In the interests of brevity VSL has not incorporated a copy of this indictment or the indictment in the "Baltimore action", *infra*, in the Appendix.

(5) *U.S. v. Inryco, Inc., et al.*, U.S.D.C. No. Y-80-054 (D. Md.) [Eastern States conspiracy indictment, referred to herein as the "Baltimore" action]

Finally, on February 13, 1980, VSL and three other post-tensioning companies, along with two individual defendants, were indicted in Baltimore on charges of conspiring to allocate commercial and governmental post-tensioning jobs, during the period April 1977 to May 1978.

Status: VSL entered a *nolo* plea in July 1981.

stitution. Subsequent to the filing of VSL's motion and prior to oral argument, jeopardy attached to VSL in the Miami action, when a jury, after deliberating for approximately one hour, returned a verdict of acquittal as to VSL and the other defendants. The acquittal was entered on May 12, 1980.

Jeopardy has also attached to VSL in three of the other actions. In the Bridge action, District Judge Irving Hill entered a judgment of conviction based upon VSL's June 10, 1980 *nolo contendere* plea. Similarly in the Los Angeles action, U.S. District Judge David Williams entered a judgment of conviction based upon VSL's *nolo* plea entered June 15, 1980. More recently, U.S. District Judge Joseph Young entered judgment of conviction on August 14, 1981, in the Baltimore action based upon VSL's previously entered *nolo* plea in that case. In sum, VSL has been placed in jeopardy in four of the five criminal proceedings brought by the government against it; the only indictment which remains outstanding is the Rocky Mountain States indictment below.

Shortly after being acquitted in Miami, VSL filed a reply memorandum in the Denver action bringing its former jeopardy to the attention of the district court and submitting an Appendix of grand jury testimony taken by the government. The testimony showed that there was a single conspiracy in the post-tensioning industry, embracing both the geographic areas involved in the Miami and Los Angeles actions as well as the geographic area involved in the Denver case.

On May 23, 1980, the Honorable Zita L. Weinshienk heard argument on VSL's motion to dismiss the Denver indictment. Judge Weinshienk, in an oral ruling, denied VSL's motion. (A.-7) (Hereinafter Appendix references shall be to the page of the Appendix where the reference appears).

VSL filed a timely notice of appeal to the Tenth Circuit Court of Appeals and argued that the district court's decision should be reversed on the grounds, *inter alia*, that the district court had erroneously placed the burden of proving the double jeopardy defense on VSL; that the evidence submitted to the district court, which was unopposed by any evidence submitted by the government,[3] demonstrated a single, national conspiracy rather than a series of distinct regional conspiracies; and that the simultaneous prosecution of VSL in five separate actions, was a violation of the Double Jeopardy and Due Process Clauses.

On August 18, 1981, the court of appeals, in an unpublished opinion, affirmed the decision of the district court, ruling in essence that VSL bore, and had failed to meet, the burden of demonstrating that jeopardy in the Miami and Los Angeles actions placed it in former jeopardy for the same offense for which it had been indicted in Denver. (A-1).

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[3]Although the government failed to produce any evidence at the district court level, it did attempt to file an Appendix (purportedly containing additional grand jury testimony) along with its Brief in the Tenth Circuit. The government's motion to file the Appendix was never granted by the Court of Appeals. Thus, the record before the Tenth Circuit consisted solely of the briefs and VSL's Appendix, which had been filed in the district court and certified to the Court of Appeals with the rest of the district court record.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

I.

THE COURTS BELOW PLACED THE BURDEN OF PERSUASION ON VSL, WHICH IS CONTRARY TO THE RULE ESTABLISHED IN MOST OTHER CIRCUITS AND ANTITHETICAL TO THIS COURT'S DECISION IN *ABNEY V. UNITED STATES*.

The Tenth Circuit's decision on the burden of proof issue is appropriate for review by writ of certiorari under Sup.Ct.R. 17(a) & (c) because it decided an important and unsettled question of federal law and established a rule in direct conflict with decisions of the majority of other circuit courts of appeals.

The district court, at the urging of the government,[4] placed the burden on VSL of proving that the conspiracy charged in the Denver indictment and the conspiracy charged in Miami were in "fact and law" the same offense. U.S. District Judge Weinshienk, ruling from the bench at the conclusion of the hearing on VSL's motion to dismiss, held:

> "I would find that VSL has not met its burden to establish a national conspiracy embracing both Florida and Denver. There is simply no record before this Court which would indicate that any issues of fact or law which are the subject of the indictment were on trial in Florida . . . ." (A-7).

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[4]At the May 23, 1980 hearing on VSL's motion the government's attorney argued "VSL must show it was part of a national conspiracy; that Florida was part of that same national conspiracy and that Denver was part of that same national conspiracy." (Tr. p. 73). Additionally, the government argued that VSL had the burden in its opposition memorandum in the district court.

The court of appeals, again at the government's behest,[5] also placed the burden of showing a single conspiracy on VSL, noting in its unpublished opinion:

> "We said in *Wilshire* [*United States v. Wilshire Oil Co.*, 427 F.2d 969 (10th Cir.), *cert. denied*, 400 U.S. 829 (1970)] that the burden was on the defendant to establish the elements of double jeopardy. In *United States v. Martinez*, 562 F.2d 633 (10th Cir.), we again so held. *See also United States v. Huffman*, 595 F.2d 551 (10th Cir.); *United States v. Bowline*, 593 F.2d 944 (10th Cir.); and *United States v. Rumpf*, 576 F.2d 818 (10th Cir.), with a caveat." (A-4).

Accord, *United States v. Castro*, 629 F.2d 456, 461 (7th Cir. 1980).

This legal rule places the Tenth and Seventh Circuits in conflict with other courts of appeals which have consistently held that the burden of persuasion shifts to the government once the defendant makes a "non-frivolous" showing that a second indictment charges the same offense for which the defendant has suffered former jeopardy. The Second, Third, Fifth, Sixth and Eighth Circuits[6] shift the burden of persuasion to the government in such circumstances. *See United States v. Mallah*, 503 F.2d 971, 986 (2nd Cir. 1974) *cert. denied*, 420 U.S. 995, 95 S.Ct. 1425 (1975); *United States v. Inmon*, 568 F.2d 326, 330-31 (3rd Cir. 1977); *United States v. Stricklin*, 591 F.2d 1112, 1118-19 (5th Cir.) *cert. denied*, 444 U.S. 963, 100 S.Ct. 449 (1979); *United States v. Jabara*, 644 F.2d 574, 576-77 (6th Cir. 1981); *United*

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[5]Brief of the United States pp. 7, 9.

[6]The Fourth Circuit has not reached the issue although a district court in Maryland has followed the lead of the Second, Third, Fifth, Sixth and Eighth Circuits. *United States v. Inryco* [1981-2] Trade Cas. ¶64,244 (CCH) (D. Md. 1981).

States v. Tercero, 580 F.2d 312, 315, n.12 (8th Cir. 1978).[7] There is thus a significant conflict on the burden of proof issue within the courts of appeals; a conflict which this Court should resolve.

The courts that have held that the government bears the burden of persuasion once the defendant has demonstrated a non-frivolous claim of former jeopardy have reasoned that the shift in the burden is appropriate for two reasons.

First, it is no more than fair that the government should bear the burden in light of its greater knowledge of the facts it intends to present at the second trial and its greater ability to present that evidence through immunized testimony. Second, the government has the responsibility of drafting appropriately detailed indictments.[8] The court in *Stricklin*, *supra*, articulated the rationale as follows:

> "[T]he burden of establishing that the indictments charge separate crimes is most equitably placed on the government when a defendant has made a non-frivolous showing that an indictment charges the same offense as that for which he was formerly placed in jeopardy.
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> * * *
>
> The impracticality of placing the burden of persuasion on the defendant in this situation is obvious in light of his lack of access to the proof on which the

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[7]The Ninth Circuit, composing a variation on the theme of these cases, has held that when a criminal defendant makes a non-frivolous showing that it is being prosecuted twice for the same offense, the burden of going forward with contrary evidence shifts to the government, but the burden of persuasion remains with the defendant. *See United States v. Bendis*, 657 F.2d 1025, 1028-29 (9th Cir. 1981).

[8]*United States v. Inmon*, 568 F.2d 326, 329 (3rd Cir. 1977); *United States v. Jabara*, 644 F.2d 574, 576-77 (6th Cir. 1981); *United States v. Stricklin*, 591 F.2d 1112, 1118 (5th Cir.) *cert. denied*, 444 U.S. 963, 100 S.Ct. 449 (1979).

government proposes to rely and his inability to offer immunity to prospective witnesses.

Where a prior indictment resulted in a guilty plea or was dismissed, so that there is no record of the evidence supporting the prior indictment, the defendant is even further handicapped. The government is clearly in a better position to show that the crime charged in the present indictment is not the same as one charged in a previous indictment than the defendant is to show that the crimes are the same.

The government's responsibility for securing an indictment which is sufficiently detailed to inform the defendant of the charges against him and to allow him later to claim the defense of double jeopardy if he be again charged with that crime further justifies placing the burden of persuasion on the government." 591 F.2d at 1118 (citations omitted).

This analysis has greater force in light of this Court's decision in *Abney v. United States*, 431 U.S. 651, 660, 97 S.Ct. 2034 (1977), which established that the Fifth Amendment right to be free from multiple prosecutions for the same offense is so important that it can only be preserved if a criminal defendant has the opportunity to adjudicate the double jeopardy bar to the second prosecution before he must suffer the experience of another trial.

As this Court held in *Abney:*

"[T]he rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence. To be sure, the Double Jeopardy Clause protects an individual against being twice convicted for the same crime, and that aspect of the right can be fully vindicated on an appeal following final judgment, as the Government suggests. However, this Court has long

> recognized that the Double Jeopardy Clause protects an individual against more than being subjected to double punishments. It is a guarantee against being twice put to *trial* for the same offense." 431 U.S. at 660 (emphasis in original).

The protection afforded criminal defendants by *Abney* will prove cruelly hollow if the burden of proof rule applied by the courts below is allowed to prevail.

In the post-*Abney* procedural context, the defendant faced with the burden of proving the identity of the offenses charged against him does not have available the transcript of the second trial and many times will not even have available the transcript of a first trial[9] to use as evidence that the offenses charged in the two cases are the same. Nor does the defendant have the prescience to enable him to anticipate the proof the prosecutor will present in the second trial. More importantly, in multiple conspiracy prosecutions, such as presented here, the government may try both allegedly "separate" conspiracies without eliciting any evidence it may have of a broader, all-encompassing conspiratorial agreement which would render the second and subsequent prosecutions Constitutionally repugnant.

As this Court has recognized in other contexts, the Due Process Clause prohibits the government from shifting the burden of proof to the defendant where the mere procedural convenience to the prosecutor resulting from such a shift results in hardship or injustice to the defendant, caused by the chance he will be unable to meet the burden. *Morrison*

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[9]Where a guilty plea or, as in the Los Angeles action, a *nolo contendere* plea is entered in the earlier case, there will be no evidentiary record available, yet prior jeopardy would clearly have attached. *See United States v. Stricklin*, 591 F.2d 1112, 1118 (5th Cir.) *cert. denied*, 444 U.S. 963, 100 S.Ct. 449 (1979); *United States v. Inmon*, 568 F.2d 326, 329 (3d Cir. 1977).

v. People of State of California, 291 U.S. 82, 88-97, 54 S.Ct. 281 (1933) (Cardozo, J.). In other Fifth Amendment contexts the Court has also placed the burden on the government.[10]

This is a clear case presenting issues appropriate for review under Sup.Ct.R. 17(a) & (c) and the Court should therefore grant the Petition and reverse the Tenth Circuit's misallocation of the burden of proof in this case.

II.

THE COURT SHOULD GRANT CERTIORARI TO RESOLVE AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW: WHETHER DOUBLE JEOPARDY CLAIMS IN SUCCESSIVE CONSPIRACY CASES SHOULD BE EVALUATED UNDER THE *SAME EVIDENCE* TEST OR UNDER A MORE FLEXIBLE AND PRAGMATIC *SAME CONSPIRACY* TEST.

Certiorari is also appropriate in this case under Sup.Ct.R. 17(a) & (c) because the court below, in applying the same evidence test to VSL's double jeopardy motion decided an important question of unsettled federal law and created a conflict with decisions of other courts of appeals.

This Court confirmed last term in *Albernaz v. United States*, 450 U.S. 333, 101 S.Ct. 1137 (1981) that the same evidence test of *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180 (1932), is an appropriate method of discerning congressional intent where, in a single prosecution, a defendant's single act is the basis for charging violations of two separate conspiracy statutes, and in that regard distinguished *Braverman v. United States*, 317 U.S. 49, 63 S.Ct. 99 (1942). The instant case raises the unsettled

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[10]*See e.g., Miranda v. Arizona*, 384 U.S. 436, 475, 86 S.Ct. 1602 (1966) (government bears the burden of showing that a criminal defendant, interrogated after being informed of his right to counsel and the privilege against self-incrimination, has knowingly waived those rights).

question, expressly foreshadowed in *Albernaz* and looming since *Braverman*,[11] of which standard should apply to determine whether multiple prosecutions for a course of conduct alleged to be separate conspiracies violative of a single statute, is, in fact, based upon a single conspiracy, fragmentation of which offends the Double Jeopardy Clause.

A. The Two Tests

The decisions below exemplify the inadequacy of the same evidence test for resolving double jeopardy questions in conspiracy cases arising under a single statute and argue persuasively for the necessity of this Court's guidance. Lower courts, grappling with the "frustrating and challenging"[12] process of applying double jeopardy principles in multiple conspiracy prosecutions have taken an *ad hoc* approach to the inquiry and applied several different and inconsistent tests.[13] For purposes of analysis the two predominant tests can be characterized as the *same evidence* test and the *same conspiracy* test.

The same evidence test, which the courts below employed, was first articulated in the 18th Century and has been variously stated. One court framed the test as follows:

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[11]In *Braverman* the government conceded that only one conspiracy was proven. 317 U.S. at 52. In addition *Albernaz*, as the court of appeals went out of its way to observe, did not involve multiple actions:

> "We conclude with a cautionary admonition. First, our holding that double jeopardy is not offended by these conspiracy charges brought in a single proceeding does not extend to the multiple prosecution area, *and the government would be well-advised to bring all of its charges, (relating to a single conspiracy) in a single proceeding.*" 612 F.2d at 925 (emphasis supplied).

[12]*United States v. Rodriguez*, 585 F.2d 1234, 1251 (5th Cir. 1978), *rehearing en banc*, 612 F.2d 906, *decision en banc affirmed, sub nom. Albernaz v. United States*, 450 U.S. 333, 101 S.Ct. 1137 (1981) (quoting *United States v. Perez*, 489 F.2d 51, 57 (5th Cir. 1974)).

[13]*See* Note, "*Single v. Multiple*", *Criminal Conspiracies: A Uniform Method of Inquiry for Due Process and Double Jeopardy Purposes*, 65 Minn.L.Rev. 295, 296 (1980).

> "A conviction or acquittal upon one indictment is no bar to subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other."[14]

A variation of this version of the test holds that offenses are considered the same if they are identical in law and fact.[15] This latter formulation is the rule followed by the district court below. (A.-7) In essence, the same evidence test will not bar a subsequent prosecution unless the legal and factual elements of the two cases are the same.[16]

Recently the same evidence test has been criticized[17] and many lower federal courts, recognizing its limitations, have refused to apply it in conspiracy cases. One of the earliest and most persuasive critiques of the same evidence test was Justice Brennan's concurring opinion in *Ashe v. Swenson*, 397 U.S. 436, 448, 90 S.Ct. 1189 (1970). The analysis of that opinion has been adopted by several lower courts in the conspiracy area. For example, in *United States v. Castro*, 629 F.2d 456 (7th Cir. 1980), the Court of Appeals for the Seventh Circuit rejected the same evidence test in favor of the broader same conspiracy rule observing that the same evidence test would rarely prevent multiple conspiracy prosecutions.

> "The Government can shape the overt acts charged in each indictment and thus under the guise of prosecu-

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[14]*Morrey v. Commonwealth*, 108 Mass. 433, 434 (1871).

[15]*United States v. Pacelli*, 470 F.2d 67, 72 (2nd Cir. 1972) *cert. denied*, 410 U.S. 983, 93 S.Ct. 1501 (1973).

[16]*Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180 (1932).

[17]*See e.g.*, Note, *The Double Jeopardy Clause as a Bar to Reintroducing Evidence*, 89 Yale L.J. 962, 963-67 (1980); Note, *supra* note 13, at 304-06.

> torial discretion advance the proposition of one conspiracy's being capable of proof in several prosecutions requiring different evidence for each conviction. To determine whether a conspiracy has been subdivided arbitrarily, resulting in multiple indictments for a single illegal agreement, courts therefore will look to both the indictments and the evidence and consider such factors as whether the conspiracies involve the same time period, alleged co-conspirators and places, overt acts, and whether the two conspiracies depend on each other for success. Where several of these factors are present, the conclusion follows that the alleged illegal combinations are not separate and distinct offenses." 629 F.2d at 461.

Many other courts have taken this same pragmatic approach because of the deficiencies of the same evidence test,[18] particularly when applied to multiple or serial conspiracy charges.

The case at bar starkly demonstrates the potentially unjust results that can flow from application of the same evidence test in conspiracy cases. The Tenth Circuit in effect followed the lead of the district court, eschewing the same conspiracy test in favor of the more technical and restrictive same evidence test. While the court of appeals' opinion is not

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[18]*See e.g., United States v. Bendis*, 657 F.2d 1025, 1029-30 (9th Cir. 1981); *United States v. Jabara*, 644 F.2d 574, 577 (6th Cir. 1981); *United States v. Tercero*, 580 F.2d 312, 315 (9th Cir. 1978); *United States v. Mallah*, 503 F.2d 971, 985, n.7 (2nd Cir. 1974), *cert. denied*, 420 U.S. 995, 95 S.Ct. 1425 (1975) (dicta); *Short v. United States*, 91 F.2d 614, 621-22 (4th Cir. 1937); *United States v. Cotton*, [1976-1] Trade Cas. ¶60,726 and ¶60,889 (CCH) (W.D. La. 1976); *United States v. American Honda Motor Company*, 289 F.Supp. 277 (S.D. Ohio); 273 F.Supp. 810 (N.D. Ill.) and 271 F.Supp. 979 (N.D. Cal. 1967); *United States v. H. E. Koontz Creamery, Inc.*, 257 F.Supp. 295 (D. Md. 1966) and 232 F.Supp. 312 (D. Md. 1964).

entirely clear on this point,[19] a review of the record demonstrates that the decision of the district court could not have been affirmed unless the court of appeals followed and erroneously applied the same evidence standard.

B. The Evidence Below

At the district court level, VSL submitted approximately 200 pages of grand jury testimony taken by the government in its lengthy investigation of the post-tensioning industry. This evidence demonstrated that the government had improperly fragmented a unitary, national conspiracy into chronologically overlapping "regional" conspiracies.[20] The testimony, which consisted of excerpts[21] from the testimony of 12 grand jury witnesses, was filed with VSL's Reply Memorandum in Support of its Motion to Dismiss the Indictment in this case.

The excerpts indicate that in approximately 1971 and continuing thereafter, at least into 1974, there were several national meetings attended by the Presidents or managing agents of virtually all of the competitors in the post-ten-

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[19]The opinion states, in its concluding paragraph, that "whether we apply the same evidence rule strictly or some variation of it we must hold that on the record before us it is evident the Colorado alleged conspiracy was not part of a larger conspiracy including Florida or California." (A-4, 5).

[20]VSL is neither required to, nor does it, vouch for the witnesses who testified as to the existence of a national conspiracy among the post-tensioning companies. *See* Rule 607, *Federal Rules of Evidence*. Moreover, the statements in this Petition regarding the evidence cannot be used by any party for any purpose in any proceeding against VSL. *See United States v. Inmon*, 568 F.2d 326, 332-33 (3d Cir. 1977); *United States v. H.E. Koontz Creamery, Inc.*, 257 F.Supp. 295, 300 (D.Md. 1966). *Cf. Simmons v. United States*, 390 U.S. 377, 392-94, 88 S.Ct. 967 (1969).

[21]The government did not produce entire transcripts to VSL but only those portions which it viewed as relevant to the issue of whether there was one national conspiracy or several regional conspiracies. Needless to say VSL has no way of knowing what the unproduced testimony contains.

sioning industry.[22] These meetings occurred in connection with meetings of the Post-Tensioning Materials Fabricators Committee (PTMFC) of the Prestressed Concrete Institute (PCI), an industry trade association.

At one of these meetings, in New Orleans in 1972, the post-tensioning companies reached an understanding to allocate post-tensioning work within each regional marketing area or zone.[23] This national agreement was affirmed at a 1973 meeting in Los Angeles, California.[24] The testimony further indicates that there was another national level meeting in 1974 in San Francisco.[25] The national agreement was to be implemented on a regional basis including, *inter alia*, the Southeastern States and Florida [Miami indictment], the Southwestern States [Los Angeles indictment], and the Rocky Mountain States [Denver indictment].[26]

This national agreement, which one of the government attorneys dubbed the "New Orleans Plan"[27] was initially sketched on a zone map which the industry's trade association had developed for use in reporting tonnage of post-tensioning products sold. At the New Orleans meeting, the zone map was used to allocate business to companies by the various zones.[28]

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[22]Yegge 4/5/79 Tr. 55, 57-60, 66-70, 77-79, 83-106; Yegge 4/26/79 Tr. 134-43; Noble Tr. 15-16; Schechter Tr. 67-70, 81-88, 93-97; Koohns Tr. 30-38, 47-54. All references are to the grand jury transcript contained in the Appendix to the Reply Memorandum of VSL Corp., which VSL has requested the Clerk of the Tenth Circuit Court of Appeals to certify to this Court for consideration with this Petition.

[23]Yegge Tr. 84-86, 100-101.

[24]Yegge Tr. 134-142.

[25]Kaul Tr. 38-39.

[26]Yegge 4/5/79 Tr. 83-106; Yegge 4/26/79 Tr. 32, 103-120; Hoffman Tr. 57-60; Koons Tr. 47-52.

[27]Hoffman Tr. 70.

[28]Yegge Tr. 79-81.

VSL's evidence at the district court level in the form of grand jury testimony also showed that, pursuant to the "New Orleans Plan", the competitors thereafter attended follow-up meetings in the various regional marketing areas in an effort to implement the national understanding of allocating jobs on a region-by-region basis.[29] The government's five indictments against VSL and its competitors merely reflect, at best, the government's view that VSL and its competitors succeeded in carrying out a national agreement in five separate regional areas. Thus the multiple indictments represent the improper fragmentation of one conspiracy into *sub-agreements;* stemming from a broader, single agreement. *See United States v. Tanner*, 471 F.2d 128, 141 (7th Cir.), *cert. denied*, 409 U.S. 949, 93 S.Ct. 269 (1972) (single conspiracy can not be broken down into component sub-agreements).

In addition to the evidence of the witnesses before the grand jury, VSL submitted to the district court copies of all five conspiracy indictments returned against it by the government.

The factual mosaic presented solely by the allegations of the indictments suggests that there was a single national conspiracy rather than a series of distinct, regional conspiracies. Even with the opportunity to tailor the indictments in support of the government's "separate" conspiracies theory, the government's pleadings allege that between 1970 and 1977 VSL, Prescon and a substantially overlapping, small group of other competitors agreed to allocate post-tensioning jobs in 30 states. The substantial identity of the alleged conspirators is telling evidence that the conspiracy

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[29]Hoffman Tr. 57-60, 64-77, 102-115; Noble Tr. 23-28; Koons Tr. 49-60; Denham Tr. 48-60; Kaul Tr. 38-39, 53-57; Yegge 4/26/79 Tr. 103-120.

was much broader than the government now asserts. VSL, of course, has been named in all five indictments. Prescon has also been identified as a co-conspirator in each of the five cases. Western Concrete Structures and Atlas Prestressing Corporation have been identified as co-conspirators in at least three cases each.[30] These factors, buttressed by the grand jury testimony submitted by VSL, showed that there was, in reality, a single national conspiracy to be implemented regionally, all pursuant to what, it ought to be remembered, the government attorneys called "the New Orleans Plan".

Significantly, the Denver, Miami and Los Angeles actions involve indictments which pleaded regional Sherman Act conspiracies, all three of which were allegedly on-going in 1975 and 1976, a period immediately following the national meetings. VSL, Prescon and Atlas were alleged to have been co-conspirators in all three indictments. Thus, these three companies are alleged to have *simultaneously* conspired in each of these three "separate" regional conspiracies. As previously noted, jeopardy has attached to VSL in Miami, by trial and acquittal, and in Los Angeles, by *nolo* plea.

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[30]The indictments themselves only name Prescon in four cases; Western in two and Atlas in two. It was not until VSL obtained Bills of Particulars from the government that it was revealed that these companies were considered unindicted co-conspirators in additional cases. This confirms what many courts have already recognized: that the government's discretion in drafting indictments and its superior knowledge about the facts it will seek to prove in a second trial justify placing the burden on the government to show that alleged separate conspiracies are not part of a larger conspiracy. *See, e.g., United States v. Stricklin*, 591 F.2d 1112, 1118 (5th Cir.), *cert. denied*, 444 U.S. 963, 100 S.Ct. 449 (1979) (government's attempt to file superceding indictment carving out allegations relevant to prior conspiracy conviction may not bode well for assertion of separate conspiracies).

In addition, as VSL argued to the courts below, basic principles of conspiracy law required a finding that the conspiracy tried in Miami and the conspiracy alleged in Denver were, despite the different dates alleged by the government, part of larger, national conspiracy for which VSL had already been placed in jeopardy.

It is a harsh, but fundamental, precept of conspiracy law (which should, in this case have operated in favor of the defendant) that where the government has shown the existence of a continuing conspiracy, a defendant has the burden of showing that he withdrew from or abandoned the conspiracy. The defendant must prove "affirmative acts [of withdrawal] inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators." *United States v. United States Gypsum Co.*, 438 U.S. 422, 464-465, 98 S.Ct. 2864 (1978). In addition, courts have held that failure of the conspiracy to achieve its objectives does not negate its continuing existence, *United States v. Kellerman*, 431 F.2d 319, 323 (2nd Cir. 1970), *cert. denied*, 400 U.S. 957, 91 S.Ct. 356 (1970); and a mere hiatus does not show that the conspiracy has terminated. *United States v. Vila*, 599 F.2d 21, 24 (2nd Cir.), *cert. denied*, 444 U.S. 837, 100 S.Ct. 73 (1979).

Application of these principles should have required the government, as the party seeking to show the cessation of one national conspiracy and inception of several contemporaneous regional conspiracies, to introduce evidence meeting these standards. The government, ordinarily eager to invoke this harsh rule when it operates in favor of the

prosecution, chose not to introduce any evidence to the district court, and relied on purely legal arguments.[31]

On this record, it is clear that if the same conspiracy test had been applied by either the district court or the Tenth Circuit, VSL's double jeopardy argument would have been recognized and it would not now face "running the gauntlet" a fifth time.[32]

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[31]That this was a deliberate decision by the Justice Department is suggested by the fact that two weeks later the government presented evidence at an evidentiary hearing in the Baltimore case in support of its position that that conspiracy, which was alleged to have commenced in April 1977, was distinct from the national conspiracy shown by the grand jury testimony to have developed at meetings in 1971 through 1974. After the hearing Judge Young concluded that VSL had made a prima facie showing that the conspiracy alleged in Baltimore was part of a larger national conspiracy and that despite the alleged 1977 inception date in Baltimore, the government bore the burden of adducing affirmative evidence that the earlier conspiracy had terminated and been replaced by the purportedly distinct Eastern States conspiracy. [1981-2] Trade Cas. ¶64,244 (CCH) (D. Md. 1981).

The fact that the government was able to meet that burden in Baltimore, and persuade Judge Young that the Eastern States conspiracy was in fact separate, only highlights the error committed by the courts below. Judge Young refused to apply the same evidence test and avoided the injustice of determining the important question of double jeopardy on the basis of technical pleading rules.

[32]Virtually every other reported opinion, in which an *antitrust* conspiracy has been alleged, has applied the more practical same conspiracy test and found that the attempt to break the conspiracy into separate parts to permit multiple prosecutions violated the Double Jeopardy Clause. In *United States v. American Honda Co.*, 271 F.Supp. 979 (N.D. Cal. 1967) the court, on the basis on affidavits and the indictments concluded that American Honda, which had been indicted in several districts and convicted of conspiring with its local dealers in the Southern District of California to fix prices, could not be prosecuted in the Northern District of California for an allegedly separate conspiracy with other dealers because Honda and its dealers had a "common continuing objective of fixing . . . prices of the product in all areas on a virtually nationwide scale." *Id.* at 983-84. *See also United States v. Cotton*, [1976-1] Trade Cas. ¶60,889 (CCH) (W.D. La. 1976); *United States v. Cotton*, [1976-1] Trade Cas. ¶60,726 (CCH) (W.D. La. 1975); *United States v. H. E. Koontz Creamery, Inc.*, 257 F.Supp. 295 (D. Md. 1966) and *United States v. Koontz Creamery, Inc.*, 232 F.Supp. 312 (D. Md. 1964). *But see United States v. Wilshire Oil Co.*, 427 F.2d 969 (10th Cir.), *cert. denied*, 400 U.S. 829, 91 S.Ct. 58 (1970).

C. The Advantages of the Same Conspiracy Test

Adoption of the same conspiracy test would not put an unbearable burden on the government but would rationalize double jeopardy analysis in conspiracy cases. The same evidence test is easy to apply but often is unjust in its results. The same evidence rubric is clearly inadequate to prevent multiple prosecutions of the same conspiracy. Merely by careful pleading the prosecutor can carve up a single conspiracy into separate indictments none of which overlap in their legal or factual allegations so as to trigger the double jeopardy prohibition.

Moreover, the same evidence test permits the prosecutor to abuse what Justice Jackson has called the "elastic, sprawling and pervasive offense" of conspiracy.[33]

The malleability of the concept of conspiracy and the potential for prosecutorial manipulation of the doctrine under the same evidence test is demonstrated by comparing the government's compact and restrictive view of the scope of conspiracies in this action with its expansive view in the related case of *United States v. Inryco, Inc.* [1981-1] Trade Cas. ¶63,952 (CCH) (9th Cir. 1981).

In that case the government indicted Inryco for rigging post-tensioning project bids with a competitor in 1974. The indictment, brought more than five years after the last bid was submitted was challenged as barred by the statute of limitations. Relying on the doctrine of continuing conspiracies the government convinced the Ninth Circuit to reverse the district court's dismissal of the indictment. The government argued that the conspiracy, which began with the agreement to submit complementary bids, *extended* to in-

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[33] *Krulewitch v. United States*, 336 U.S. 440, 445-46, 69 S.Ct. 716 (1949).

clude the payment of the reward in the form of subcontracts to the higher bidder. The Ninth Circuit agreed,

> "While a Sherman Act conspiracy is technically ripe when the agreement to restrain competition is formed, it remains actionable until its purpose has been achieved or abandoned, and the statute of limitations does not run so long as the co-conspirators engage in overt acts designed to accomplish its objectives. *U.S. v. Kissel*, 218 U.S. 601, 607-608, 31 S Ct. 124, 125-126, 54 L.Ed. 1168 (1910)." *Id.* at 75,929 (footnote omitted).

It is difficult to see how a court applying the government urged definition of conspiracy in *Inryco* and faced with the evidentiary record in this case could have found that the national conspiracy, proved by VSL's evidence in the form of the governments *own* grand jury testimony, did not encompass the conspiracies charged in Miami, Los Angeles and Denver. The disjunction, of course, is caused by the same evidence test which, as Justice Brennan has observed, instead of enforcing the constitutional guarantee against double jeopardy, virtually annuls it. *Ashe v. Swenson*, 397 U.S. at 451. The Court should grant certiorari to rationalize this important corner of double jeopardy law.

III.

THE COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER, APART FROM DOUBLE JEOPARDY CONSIDERATIONS, THE GOVERNMENT'S MULTIPLE PROSECUTIONS OF VSL FOR A SINGLE COURSE OF CONDUCT VIOLATES THE DUE PROCESS CLAUSE.

The decision below, rejecting VSL's due process argument should be reviewed under Sup.Ct.R. 17(c) because the issue is an important and unsettled question of federal constitutional law.

The courts below apparently rejected VSL's argument that the government's decision to prosecute it five separate

times violated the Due Process Clause. Though extensively briefed, the court of appeals ignored the issue in its opinion (A-1). The fundamental rights protected by the Due Process Clause deserve more than such cavalier treatment.

VSL has been charged in the five indictments with engaging in the same course of conduct with essentially the same co-conspirators during the same or overlapping periods of time. Each of the five indictments alleges that VSL and other co-conspirators engaged in a conspiracy to violate Section 1 of the Sherman Act by agreeing to allocate post-tensioning jobs.

The difficulties of defending against five separate conspiracy indictments returned in four federal districts spanning the breadth of our country are staggering indeed.[34] Few corporate giants could marshal the necessary resources to defend in such a situation. VSL is *not* such a company. It is a relatively new company (incorporated in 1966) in a new and struggling industry.

In this series of interrelated cases, VSL has, at considerable expense, successfully defended itself in one of these actions. It has elected to enter *nolo contendere* please in three of the other cases.[35] Thus, at this time, VSL has already been put in jeopardy four times in these cases. Unless this Court puts a halt to the instant action, VSL literally faces the spectre of quintuple jeopardy.

Thus, double jeopardy considerations aside, the concept of fundamental fairness and fair play embodied in the Due Process Clause should apply to the government's continued

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[34]For example, on the same day in 1980 VSL had to participate simultaneously in pre-trial proceedings in Miami, Baltimore, and Denver. The next day VSL went to trial in Miami.

[35]Cumulative fines of $285,000 have already been imposed on VSL in the Baltimore case and the two Los Angeles cases.

pursuit of its multiple prosecutions of VSL, *see Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 160-164, 71 S.Ct. 624, 642-650 (1951) (Frankfurter, J., concurring) and require the conclusion that these vexatious and oppressive multiple prosecutions violate the fairness principles of the Due Process Clause. *Ashe v. Swenson*, 397 U.S. 436, 454, 90 S.Ct. 1189 (1970) (Brennan, J., concurring). *See also Continental Can Co. v. Marshall*, 603 F.2d 590, 597 (7th Cir. 1979).

Multiple prosecutions, such as presented in the case at bar, have been found by lower courts to violate the Due Process Clause. *See United States v. American Honda Motor Company*, 273 F.Supp. 810, 819-20 (N.D. Ill.); 271 F.Supp. 979, 987-88 (N.D. Cal. 1967); *United States v. United States Gypsum Company*, 404 F.Supp. 619, 624 (D.D.C. 1975). In applying the Due Process Clause to the facts presented in that case the *Honda* court held:

> "Defendant American Honda further contends and *we think properly*, that entirely apart from the double jeopardy provision of the Fifth Amendment, successive Grand Jury inquiries and indictments for alleged separate conspiracies arising out of the same transaction may, and in this situation do, constitute harassment in violation of the due process provision of the Fifth Amendment which provision, as explained by Justice Frankfurter in *Joint Anti-Fascist Refugee Committee v. McGrath, Attorney General*, 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817 (1951), is essentially a recognition of the requirement of fundamental fairness and fair play under a given set of circumstances." 273 F.Supp. at 819 (emphasis supplied).

After noting the unfairness and oppressiveness of the multiple indictments and multiple document subpoenas,[36] the court in *Honda* concluded:

> "This is precisely the sort of harassment which fundamental fairness and the due process clause prohibit. *The Government is not a ringmaster for whom individuals and corporations must jump through a hoop at their own expense each time it commands.*" *Id.* at 820 (emphasis supplied).

The due process bar to multiple prosecution was also recognized in *United States v. United States Gypsum Company:*

> "Multiple antitrust prosecutions arising out of the same course of conduct are particularly unfair because of their length and expense and because of the complex and voluminous nature of the evidence which is customarily involved, *and courts have not hesitated to prevent abuse in this area.*" 404 F.Supp. at 624 (emphasis supplied).

Even the government has recognized "that several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions, a policy dictated by considerations of fairness to defendants and of efficient and orderly law enforcement." *Petite v. United States*, 361 U.S. 529, 530, 80 S.Ct. 450 (1960) (Solicitor General's Statement on Motion to Remand on Appeal). It is clear, then, that the principles of due process, separate and distinct from double jeopardy concepts, may and, in this case, do bar further

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[36]During the course of the post-tensioning industry investigation, between January 1979 and February 1980, VSL was subjected to a total of *five* grand jury subpoenas *duces tecum*, requiring production of over 40,000 document pages.

prosecution of VSL for the same course of conduct. At the very least they ought to bar a *fifth* prosecution.

This is evident if one considers this Court's decision in *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056 (1969) applying double jeopardy principles to the states through the Due Process Clause of the Fourteenth Amendment. There the Court, quoting from *Green v. United States*, 355 U.S. 184, 187-88, 78 S.Ct. 221 (1957), identified the due process elements that bar a state from subjecting a criminal defendant to multiple prosecutions:

> " '[T]he underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.' This underlying notion has from the very beginning been part of our constitutional tradition. Like the right to trial by jury, it is clearly 'fundamental to the American scheme of justice.' " 395 U.S. at 795-76.

If the Fourteenth Amendment Due Process Clause prevents states from subjecting defendants to multiple prosecutions then, *a fortiori*, the Fifth Amendment Due Process Clause must similarly restrict the federal government. It is no answer to say that the Fifth Amendment Due Process and Double Jeopardy Clauses are coextensive, because it is clear they are not. The Double Jeopardy Clause is concerned with multiple prosecutions of "same offenses." The Due Process Clause prevents fundamental unfairness of any kind. "Fairness of procedure is 'due process' in the primary

sense." *Joint Anti-Fascist Refugee Committee, supra,* at 161. (Frankfurter, J., concurring).

In this regard Justice Brennan, in his concurring opinion in *Ashe v. Swenson, supra,* recognized that, absent unusual circumstances, basic fairness required that all known criminal charges against an accused be brought in one indictment.

> "In my view, the Double Jeopardy Clause requires the prosecution, except in most limited circumstances, to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction. This . . . not only enforces the ancient prohibition against vexatious multiple prosecutions embodied in the Double Jeopardy Clause, but responds as well to the increasingly widespread recognition that the consolidation in one lawsuit of all issues arising out of a single transaction or occurrence best promotes justice, economy, and convenience. Modern rules of criminal and civil procedure reflect this recognition." 397 U.S. at 453-54 (citations omitted).

Justice Brennan went on to observe that it would be anomalous if a criminal defendant were accorded less protection against multiple trials then a civil litigant:

> "This anomaly would be intolerable. It was condemned by a New Jersey court nearly a century and a half ago in words even more applicable today:
>
> > 'If in civil cases, the law abhors a multiplicity of suits, it is yet more watchful in criminal cases, that the crown shall not oppress the subject, or the government the citizen, by unnecessary prosecutions. * * * [This] is a case where the state has thought proper to prosecute the offence in its mildest form, and it is better that the residue of the offence go unpunished, than by sustaining a second indictment

> to sanction a practice which might be rendered an instrument of oppression to the citizen.' *State v. Cooper*, 13 N.J.L. 361, 375-376 (1833)." 397 U.S. at 457-58.

The government could have aserted all five, allegedly separate violations against VSL in one indictment. Rule 8(a), F.R.Crim.P. Whether for strategic or statistical reasons or otherwise, it chose not to do so. Its failure to do so was so inherently unfair, so vexatious and so devoid of any legitimate prosecutorial purpose as to violate the basic fairness doctrine of the Due Process Clause. In order to prevent a fifth prosecution of VSL, this Court should review and reverse the court of appeals decision disregarding VSL's due process rights.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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Appendix

APPENDIX A.
Tenth Circuit's Opinion Below.

United States Court of Appeals, Tenth Circuit.

United States of America, Plaintiff-Appellee, v. VSL Corportion, Defendant-Appellant. No. 80-1542.

Filed: August 18, 1981.

Appeal From The United States District Court For The District of Colorado (D. C. No. 80-CR-49-3).

Before SETH, Chief Judge, BREITENSTEIN and HOLLOWAY, Circuit Judges.

SETH, Chief Judge.

A grand jury in Colorado indicted the appellant VSL Corporation, Atlas Prestressing Corporation, Prescon Corporation, Rene Friedrich (the President of VSL), David Swanson (the Vice President of VSL), Burl Gene Christian (the Division Manager in Denver of Atlas Prestressing Corporation), and Manly Jackson (a sales representative for the Rocky Mountain area of Prescon Corporation). The indictment was for one count for violation of section 1 of the Sherman Act (15 U.S.C. § 1), and two counts for mail fraud (18 U.S.C. §§ 1341, 1342). The period covered by the indictment was from January 1975 to November 1979.

VSL moved to dismiss the indictment as to it on the ground of double jeopardy, or to require the government to elect one of the then pending five indictments in several jurisdictions naming VSL. Indictments had been handed down against VSL, two in California, one in Maryland, one in Florida, and the one here concerned under section 1 of the Sherman Act. VSL was acquitted in the Florida case in May of 1980 which was before the trial judge acted in this Colorado case. VSL entered *nolo contendere* pleas in the California cases after the Florida acquittal. A double jeopardy motion was made in the Maryland case but the trial court and the Fourth Circuit denied relief.

VSL asserts that if there was any conspiracy it was nationwide and there was but a single conspiracy. The government asserts that there were the several regional conspiracies each directed only to a specified area.

The trial court denied the motion of VSL and this *Abney* type appeal was taken. The trial court stated in its denial of the motion:

> "I would find that VSL has not met its burden to establish a national conspiracy embracing both Florida and Denver. There is simply no record before this Court which would indicate that any issues of fact or law which are the subject matter of this indictment were on trial in Florida . . . ."

Some references by appellant are made to the Florida trial but no transcript was provided the trial court to demonstrate the proof there made by the government. The nature of the offense charged is the same as in this Colorado indictment except no mail fraud was there alleged. In Florida VSL and Atlas Prestressing Corporation were the corporations charged. The individuals there charged were a division manager and a division engineer of Atlas. These persons were not charged in Colorado. The business concerned was the same in all states where indictments were handed down. The charged acts were all basically the same. The conspiracy in Florida was alleged to have taken place in 1970 to 1976, in Colorado 1975 to 1977, in California May 1974 "into" 1976.

Appellant here relies in some measure on testimony before the grand jury in California. It asserts that this shows but one conspiracy if there be any at all. This was a conspiracy that was nationwide with the country divided into zones or regions. The parties, it is asserted, agreed to divide the business in each zone by collusive bidding. This was done during the course of meetings of national trade associations attended by the principal executives of the several

corporations indicted. Such a national meeting was held in 1972 in New Orleans and in California in 1973. There were thereafter a number of regional meetings attended for the most part by local managers of the several corporations.

The record also shows that the national agreement was an agreement to attempt to agree in the several regions on a division in each area. There was no agreement to divide the market on a national basis. The nationwide "agreement" lapsed. Two external factors caused its end. These were the shortage of materials with the great uncertainty as to costs and a letter of warning from an official of one of the corporations that he no longer would participate because of the illegality of the arrangement. It is clear that if there was a national conspiracy it ended before the Colorado one commenced, and it began after the Florida area conspiracy was underway. VSL began business in Colorado, according to the record, with the opening of an office in Denver.

We must agree with the trial judge that no facts were established by VSL to demonstrate that there was a national conspiracy to include both Florida and Colorado. We also conclude that there was no showing to include the California conspiracy. As indicated above, the limited record we have shows that if there was an attempt to create a national conspiracy to establish regional conspiracies, it was short-lived and terminated before the one here concerned began. The Colorado conspiracy, if there was one, was separate and apart from the others according to the facts before us on this appeal.

The Fourth Circuit, as mentioned above, recently considered a double jeopardy motion by VSL made in the proceedings commenced under the Maryland indictment, United States v. VSL, unpublished No. 80-5143. The court decided that there was no showing that the Florida proceedings gave rise to a valid claim of double jeopardy. The arguments

there advanced by VSL were the same as those before us on this appeal. The Fourth Circuit in part said of the trial court:

> "The court found that the national conspiracy had ended by 1974 because of widespread cheating, the 1973 steel shortage and a letter warning that these activities were illegal sent from a representative of one company to all PTFMC members in 1973. From 1974 to 1976, the court found, there were no regional or national meetings, and the market had become very competitive as of 1976. Further, the court found that the conspiracy charged in the Maryland indictment arose independently of the national conspiracy and subsequent to its breakdown."

In United States v. Wilshire Oil Co., 427 F.2d 969 (10th Cir.), similar contentions were made as to conspiracies in Kansas and Missouri. We decided that the purpose of the Kansas conspiracy was to raise the prices in that state and the Missouri conspiracy to raise the prices in Missouri. Wilshire was indicted in both states as were seven or eight other corporations. The court found no single, common, continuing objective to fix prices in *both* states. We said in *Wilshire* that the burden was on the defendant to establish the elements of double jeopardy. In United States v. Martinez, 562 F.2d 633 (10th Cir.), we again so held. *See also* United States v. Huffman, 595 F.2d 551 (10th Cir.); United States v. Bowline, 593 F.2d 944 (10th Cir.); and United States v. Rumpf, 576 F.2d 818 (10th Cir.), with a caveat.

We recently considered the issue of one conspiracy or several conspiracies in United States v. McMurray, ____ F.2d ____, Nos. 78-1928 and 78-1929 (10th Cir.), in an en banc opinion filed February 10, 1981. Whether we apply the same evidence rule strictly or some variation of it we must hold that on the record before us it is evident the

Colorado alleged conspiracy was not part of a larger conspiracy including Florida or California. Again, if there was a larger conspiracy it had ended before the Colorado conspiracy began.

The denial of appellant's motion is affirmed.

APPENDIX B.
Tenth Circuit's Denial of Petition for Rehearing.

NOVEMBER TERM — January 5, 1982.

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, and Honorable Jean S. Breitenstein, Circuit Judges.

United States of America, Plaintiff-Appellee, vs. VSL Corporation, Defendant-Appellant. No. 80-1542.

This matter comes on for consideration of:

A. Appellant's petition for rehearing and suggestion for rehearing en banc.

B. Appellant's motion to place the petition and suggestion under seal because public disclosure of it is prohibited by law.

Upon consideration whereof, it is ordered:

1. The petition is placed under seal until further order of the Court.

2. The petition for rehearing is denied by Circuit Judges Seth, Breitenstein, and Holloway, who rendered the decision sought to be reheard.

The Clerk having transmitted the suggestion for rehearing to the members of the panel and the judges of the court who are in regular active service, and no judge of the panel or judge in regular active service having requested a vote on the suggestion made by appellant, the suggestion for rehearing en banc is denied.

/s/ Howard K. Phillips, Clerk
HOWARD K. PHILLIPS, Clerk

APPENDIX C.
District Court's Oral Ruling.

In the United States District Court for the District of Colorado.

United States of America, Plaintiff, v. The Prescon Corporation; Atlas Prestressing Corporation; VSL Corporation; Rene Friedrich; David Swanson; Burl Gene Christian; and Manley Jackson, Defendants. Criminal Case No. 80-CR-49.

Partial Transcript of Proceedings; Before Judge Weinshienk — May 23, 1980.

THE COURT: I would find that VSL has not met its burden to establish a national conspiracy embracing both Florida and Denver. There is simply no record before this Court which would indicate that any issues of fact or law which are the subject matter of this indictment were on trial in Florida; and I see no reason to take more time to do what we have already fairly thoroughly done. My ruling would be that the motion to dismiss on double-jeopardy grounds is denied.

APPENDIX D.
Indictment, Denver.

In the United States District Court for the District of Colorado.

United States of America, Plaintiff, v. The Prescon Corporation; Atlas Prestressing Corporation; VSL Corporation; Rene Friedrich; David Swanson; Burl Gene Christian; and Manly Jackson, Defendants. Criminal Case No. 80-CR-49.

INDICTMENT.

Filed: February 21, 1980.

15 U.S.C. § 1; 18 U.S.C. § 1341; 18 U.S.C. § 2. [Sherman Antitrust Act: Conspiracy in Restraint of Trade; Use of the Mails in Furtherance of a Scheme to Defraud].

COUNT ONE
(15 U.S.C. § 1)

The Grand Jury charges:

I
DEFINITIONS

1. As used herein, the term:

(a) "Post-tension concrete construction" or "post-tensioning" means a construction process used to add tensile strength to architectural and structural concrete units by embedding high tensile steel tendons in conduits into concrete and tensioning same with hydraulic jacks.

(b) "Post-tension companies" or "post-tensioners" means any business or legal entity primarily engaged in providing the engineering, labor and/or materials to owners and/or general contractors of post-tension concrete construction projects.

(c) "Commercial structure" includes office buildings, apartment buildings, gymnasiums, hospitals, stadiums, parking structures and all other facilities constructed in whole or in part with post-tension concrete with the exception of highway bridge projects and nuclear containment vessels.

(d) "Rocky Mountain states" means the states of Colorado, Utah, Wyoming, New Mexico, Montana, North and South Dakota, Kansas, Nebraska, and Missouri.

II
DEFENDANTS

2. Each of the corporations listed below is hereby indicted and made a defendant herein. Each is organized and exists under the laws of the state indicated and has its principal place of business in the city and state indicated. Within the period of time covered by this indictment, all of these corporations were post-tension companies engaged in post-tension concrete construction in Colorado and other Rocky Mountain states:

Corporation	State of Incorporation	Principal Place of Business
Prescon Corporation	Delaware	San Antonio, Texas
Atlas Prestressing Corp.	California	Panorama City, California
VSL Corporation	California	Los Gatos, California

3. Each of the individuals named below is hereby indicted and made a defendant herein. During all or part of the period of time covered by this indictment, each such individual has been associated with the defendant post-tension company listed and has been engaged in post-tension concrete construction in the capacities indicated:

Individual	Capacity	Company
Rene Friedrich	President	VSL Corporation
David Swanson	Vice President	VSL Corporation
Burl Gene Christian	Denver Division Manager	Atlas Prestressing Corp.
Manly Jackson	Sales-Rocky Mt. States	Prescon Corporation

4. Whenever in this indictment reference is made to any act, deed, or transaction of any defendant which is a corporation or business entity, such allegation shall be deemed to mean that such corporation or other business entity engaged in such act, deed, or transaction by or through its officers, directors, partners, agents, employees, or representatives while they were actively engaged in the management, direction, control, or transaction of its business or affairs.

III
CO-CONSPIRATORS

5. Various firms and individuals, not made defendants herein, participated as co-conspirators in the offense charged herein and performed acts and made statements in furtherance thereof.

IV
TRADE AND COMMERCE

6. Post-tension concrete construction is used, *inter alia*, in the construction of commercial structures, to add tensile strength to structural framing systems, such as girders, fascia, joints, slab roofs or floors, beams, flat plates, tresses, supporting columns, tension rings and beams.

7. During the period of time covered by this indictment, defendant post-tension companies were invited to submit competitive bids to general contractors and/or owners of

commercial structures for the post-tension concrete construction of said structures in the state of Colorado and other Rocky Mountain states.

8. During the period of time covered by this indictment, defendants caused bids to be submitted for post-tension concrete construction projects within the state of Colorado and from the state of Colorado to other Rocky Mountain states.

9. During the period of time covered by this indictment, defendants caused a substantial, continuous and uninterrupted flow of steel and other essential materials for use by them in the post-tension concrete construction of commercial structures, including the commercial structures that are the subject of this indictment, in interstate and foreign commerce. The actions of the defendants and co-conspirators in carrying out the offense charged were within the flow of interstate commerce and had a substantial effect on interstate commerce.

V
OFFENSE CHARGED

10. From on or about January of 1975 and continuing thereafter until approximately November of 1977, the exact dates being unknown to this Grand Jury, in the District of Colorado, and elsewhere,

The Prescon Corporation;
Atlas Prestressing Corporation;
VSL Corporation;
Rene Friedrich;
David Swanson;
Burl Gene Christian; and
Manly Jackson,

defendants herein, and co-conspirators, engaged in a continuing combination and conspiracy to suppress and eliminate competition in the post-tension concrete construction

of commercial structures in Colorado and other Rocky Mountain states in unreasonable restraint of the above-described trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. Sec. 1.

11. The aforesaid combination and conspiracy consisted of an agreement, understanding and concert of action among the defendants and co-conspirators, the substantial terms of which were:

(a) to allocate among the corporate defendants contracts for the post-tension concrete construction of commercial structures in Colorado and other Rocky Mountain states; and

(b) to submit collusive, noncompetitive and rigged bids for the post-tension concrete construction of said structures.

12. For the purpose of forming and effectuating the aforesaid conspiracy, the defendants and co-conspirators have done those things which, as hereinbefore charged, they have combined and conspired to do, including, *inter alia:*

(a) attending meetings to discuss the submission of bids for the post-tension concrete construction of commercial structures in Colorado and other Rocky Mountain states;

(b) designating the low bidder for the post-tension concrete construction of such structures;

(c) exchanging information concerning the amounts or ranges of bids for the post-tension concrete construction of such structures; and

(d) submitting intentionally high or complementary bids, or withholding bids, for the post-tension concrete construction of commercial structures allocated to another defendant.

VI
EFFECTS

13. The combination and conspiracy charged herein has had the following effects, *inter alia*:

(a) prices for post-tension concrete commercial construction projects in Colorado and other Rocky Mountain states have been fixed, maintained and established at artificial and noncompetitive levels;

(b) competition in the post-tension concrete construction of said commercial projects has been restrained, suppressed and eliminated; and

(c) the general contractors and/or owners of said structures and projects have been denied the benefits of free and open competition in construction services therefor.

VII
JURISDICTION AND VENUE

14. The aforesaid combination and conspiracy has been carried out, in part, within the District of Colorado within five years preceding the return of this indictment.

COUNT TWO
(18 U.S.C. § 1341 and § 2)

The Grand Jury further charges:

1. Each and every allegation contained in paragraph 1 through 4 of Count One of this indictment is here realleged with the same force and effect as though said allegations were here set forth in full detail.

2. From on or after January of 1975 and continuing thereafter, the exact dates being unknown to this grand jury, in the District of Colorado, and elsewhere,

The Prescon Corporation;
Atlas Prestressing Corporation

VSL Corporation;
Rene Friedrich;
David Swanson;
Burl Gene Christian; and
Manly Jackson,

the defendants herein, together with other persons known and unknown to the Grand Jury, devised and intended to devise a scheme and artifice to defraud purchasers of post-tensioning materials and services in Colorado and other Rocky Mountain states of:

(a) money;

(b) there right to open and free competition in awarding contracts for post-tension concrete construction materials and services; and

(c) their right to award contracts for post-tension concrete construction materials and services free from collusive bidding, corruption, deceit, trickery and dishonestry.

3. It was a part of the scheme and artifice to defraud that the defendants would and did:

(a) receive and obtain solicitations for bids for post-tensioning materials and services from prospective purchasers in Colorado and other Rocky Mountain states;

(b) discuss among themselves prospective requirements for post-tensioning projects in Colorado and other Rocky Mountain states in order to select the projects and bids to be included in the scheme;

(c) exchange information among themselves concerning bid amounts or bid ranges for post-tensioning projects which they had agreed to make subject to the scheme;

(d)

allocate among themselves which post-tensioning supplier would be the successful bidder on a post-tensioning project which they made subject to the scheme;

(e) designate one post-tensioning supplier who would be the low bidder on a post-tensioning project which they had made subject to the scheme;

(f) submit to contractors collusive, noncompetitive and rigged bids for post-tensioning materials and services for those projects which they had made subject to the scheme; and

(g) submit to contractors intentionally high or complementary bids, or withhold bids, for post-tensioning materials and services for those projects subject to that scheme.

4. It was a further part of the scheme and artifice to defraud that the defendant Atlas Prestressing Corporation would be and was allocated the right to supply post-tension concrete materials and services for a project known as Bernalillo County Detention Center to be located in Albuquerque, New Mexico, and would be and was awarded a contract to supply post-tensioning materials and services on the aforesaid project.

5. On or about the 22nd day of June, 1976, in the District of Colorado, The Prescon Corporation; Atlas Prestressing Corporation; VSL Corporation; Rene Friedrich; David Swanson; Burl Gene Christian; and Manly Jackson, defendants herein, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting so to do, did knowingly place and cause to be placed in an authorized depository for mail matter a letter addressed to:

Lembke Construction Co., Inc.
P.O. Box 1188
Albuquerque, New Mexico 87103

to be sent or delivered by United States Postal Service, such envelope containing the basic Standard Form Material Contract for the furnishing of post-tension concrete construction materials and services by Atlas Prestressing Corporation for the Bernalillo County Detention Center project, all in violation of 18 U.S.C. §§ 1341 and 2.

COUNT THREE
(18 U.S.C. §1341 and §2)

The Grand Jury further charges:

1. Each and every allegation contained in paragraph 1 through 3 of Count Two is here realleged as though set forth herein as constituting a scheme and artifice to defraud.

2. It was a further part of the scheme and artifice to defraud that the defendant Atlas Prestressing Corporation would be and was allocated the right to supply post-tension concrete materials and services for the project known as YMCA Addition, located at Casper, Wyoming.

3. On or about January 13, 1977 in the District of Colorado, The Prescon Corporation; Atlas Prestressing Corporation; VSL Corporation; Rene Friedrich; David Swanson; Burl Gene Christian; and Manly Jackson, defendants herein, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting so to do, did knowingly place and cause to be placed in an authorized depository for mail matter a letter addressed to:

Lower & Co., Inc.
P.O. Box 1510
Mills, Wyoming 82644

to be sent or delivered by United States Postal Service, such envelope containing, among other things, the Accepted Purchase Order between Atlas Prestressing Corporation and Lower & Co., Inc., for the furnishing of post-tension concrete construction materials and services for the YMCA

Addition project, all in violation of 18 U.S.C. §§ 1341 and 2.

Dated: February 21, 1980.

A TRUE BILL.

/s/ James P. Gray
Foreperson Feb. 21, 1980

/s/ John H. Shenefield
JOHN H. SHENEFIELD
Assistant Attorney General

/s/ Sanford M. Litvack
SANFORD M. LITVACK
Special Assistant to the
Attorney General

/s/ Mark Leddy
MARK LEDDY

/s/ Joseph F. Dolan
JOSEPH F. DOLAN
United States Attorney

/s/ Barbara A. Reeves
BARBARA A. REEVES

/s/ Crossan R. Andersen
CROSSAN R. ANDERSEN

/s/ Brian C. Lysaght
BRIAN C. LYSAGHT

/s/ Carol L. Newman
CAROL L. NEWMAN

Attorneys,
U. S. Department of Justice
Antitrust Division
3101 Federal Building
300 N. Los Angeles Street
Los Angeles, California
(213) 688-2500

APPENDIX E.
Indictment, Miami.

United States District Court, Southern District of Florida.

United States of America, v. Atlas Prestressing Corp.; VSL Corporation; Charles Adams; and Philip Arana, Defendants. Criminal No. 80-76-CR-CA.

Filed: February 22, 1980.

15 U.S.C. § 1. [Sherman Antitrust Act; Conspiracy in Restraint of Trade]

INDICTMENT

The Grand Jury charges:

I
DEFINITIONS

1. As used herein, the term "post-tension concrete construction" or "post-tensioning" means a construction process used to add tensile strength to architectural and structural concrete units by embedding high tensile steel tendons in conduits into concrete and tensioning same with hydraulic jacks.

II
DEFENDANTS

2. Each corporation named in this paragraph is hereby indicted and made a defendant herein. Each such defendant corporation is organized and exists under the laws of the state indicated and has its principal place of business in the city and state indicated:

Corporation	State of Incorporation	Principal Place of Business
Atlas Prestressing Corp.	California	Panorama City, California
VSL Corporation	California	Los Gatos, California

3. Each person named in this paragraph is hereby indicted and made a defendant herein. During all or part of the period of time covered by this indictment, each such defendant has been associated with the designated defendant corporation and has been engaged in post-tension concrete construction in the capacity indicated:

Individual	Capacity	Company
Charles Adams	Division Manager	Atlas Prestressing Corp.
Philip Arana	Division Engineer	Atlas Prestressing Corp.

4. Whenever in this indictment reference is made to any act, deed, or transaction of any defendant corporation, such allegation shall be deemed to mean that such corporation engaged in such act, deed, or transaction by or through its officers, directors, agents, employees, or representatives while they were actively engaged in the management, direction, control, or transaction of its business or affairs.

III
CO-CONSPIRATORS

5. Various persons and firms, not made defendants herein, participated as co-conspirators in the offense charged herein and performed acts and made statements in furtherance thereof.

IV
TRADE AND COMMERCE

6. Post-tension concrete construction is used in the construction of office and residential buildings, gymnasiums, parking structures, hospitals, stadiums and other buildings (hereinafter "commercial structures"). Post-tension concrete construction is used to add tensile strength to structural framing systems, such as girders, fascia, joists, slab roofs

or floors, beams, flat plates, tresses, supporting columns, tension rings and beams.

7. During all or part of the period of time covered by this indictment, the defendant corporations were engaged in the business of selling materials and services for post-tension concrete construction to owners, architects, designers and/or general contractors of construction projects of commercial structures in the State of Florida.

8. In order to promote the use of post-tension concrete construction in the State of Florida, during all or part of the period of time covered by this indictment the defendants met with designers, architects, general contractors and other persons responsible for the selection of subcontractors for construction projects. During this period, the defendant corporations were invited to submit competitive bids to general contractors and/or owners for the post-tension concrete construction of these and other commercial structures to be constructed in the State of Florida.

9. Post-tension concrete construction requires the use of materials such as metal tendons and anchors. During all or part of the period of time covered by this indictment, the defendants used or caused to be used metal tendons and anchors in their construction of post-tension concrete structures in the State of Florida. Defendants caused a substantial, continuous and uninterrupted flow of metal tendons and anchors and other essential materials for their use in the post-tension concrete construction of commercial structures, including the commercial structures which are the subject of this indictment, into the State of Florida from other states and a foreign country. The activities of the defendants in carrying out the offense charged were within the flow of interstate commerce and had a substantial effect on interstate commerce.

V
OFFENSE CHARGED

10. Beginning in or about September 1970 and continuing thereafter into 1976, the exact dates being to this grand jury unknown.

Atlas Prestressing Corp.;
VSL Corporation;
Charles Adams; and
Philip Arana;

the defendants herein, and co-conspirators, engaged in a continuing combination and conspiracy to suppress competition in the post-tension concrete construction of commercial structures in unreasonable restraint of the above-described trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

11. The aforesaid combination and conspiracy consisted of an agreement, understanding and concert of action among the defendants and co-conspirators, the substantial terms of which were:

(a) to allocate among themselves contracts and customers for the post-tension concrete construction of commercial structures in the State of Florida; and

(b) to submit collusive, noncompetitive and rigged bids for post-tensioning materials and services to contractors and owners requesting competitive bids for the post-tension concrete construction of said structures.

12. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators have done those things which, as hereinbefore charged, they have combined and conspired to do, including, among other things:

(a) agreeing to send and sending representatives to meetings to allocate contracts and customers for the post-

tension concrete construction of certain commercial structures in the State of Florida;

(b) discussing commercial structures to be built in the State of Florida and the submission of future bids on those structures by defendant corporations;

(c) agreeing not to compete with a defendant corporation that had promoted or developed the post-tension concrete construction of certain commercial structures in the State of Florida;

(d) designating by agreement the intended low bidder for the post-tension concrete construction of such structures;

(e) exchanging information concerning the amounts or ranges of bids to be submitted for the post-tension concrete construction of such structures; and

(f) agreeing to submit and submitting intentionally high or complementary bids or agreeing to withhold and withholding bids for the post-tension concrete construction of such commercial structures allocated to another defendant or co-conspirator.

VI
EFFECTS

13. The combination and conspiracy charged herein has had the following effects, among others:

(a) prices for the post-tension concrete construction of commercial structures in the State of Florida have been fixed, maintained and established at artificial and noncompetitive levels;

(b) competition in the post-tension concrete construction of commercial structures in the State of Florida has been restrained and suppressed; and

(c) the general contractors and/or owners of said structures have been denied the full benefits of free and open competition in contracting for post-tension concrete construction services.

VII

JURISDICTION AND VENUE

14. The aforesaid combination and conspiracy has been carried out, in part, within the Southern District of Florida within five years preceding the return of this indictment.

Dated:

A TRUE BILL

_____

Foreperson

_____

SANFORD M. LITVACK
Special Assistant to the
Attorney General

_____

KENDRA S. MCNALLY

_____

MARK LEDDY

_____

RODERICK G. DORMAN

_____

BARBARA A. REEVES
Attorneys, Department of
Justice

_____

Attorneys, Department of
Justice

_____

J. V. ESKENAZI
United States Attorney

APPENDIX F.
Indictment, Los Angeles.

United States District Court, Central District of California.

United States of America, v. Western Concrete Structures Company, Inc.; Prescon Corporation; VSL Corporation; Rene Friedrich; Harold D. Long; Allan H. Stubbs; David Swanson; and Merrill Walstad, Defendants. Criminal No. 80-114.

Filed: February 7, 1980.

15 U.S.C. § 1. [Sherman Antitrust Act: Conspiracy in Restraint of Trade]

INDICTMENT

The Grand Jury charges:

I.
DEFINITIONS.

1. As used herein, the term:

(a) "Post-tension concrete construction" or "post-tensioning" means a construction process used to add tensile strength to architectural and structural concrete units by embedding high tensile steel tendons in conduits into concrete and tensioning same with hydraulic jacks.

(b) "Commercial structures" includes office buildings, apartment buildings, gymnasiums, hospitals, stadiums, parking structures and other buildings constructed in whole or in part with a post-tension concrete structural system.

(c) "Southwest United States" means the geographic area of the United States consisting of Southern California, the State of Arizona and Clark County, Nevada.

II
DEFENDANTS

2. Each of the corporations listed below is organized and exists under the laws of the state indicated and has its principal place of business in the city and state indicated. Within the period of time covered by this indictment, all of these corporations were engaged in providing the engineering, labor and/or materials for post-tension concrete construction of commercial structures in the Southwest United States:

Corporation	State of Incorporation	Principal Place of Business
Western Concrete Structures Company, Inc.	California	Gardena, California
Prescon Corporation	Delaware	San Antonio, Texas
VSL Corporation	California	Los Gatos, California

3. During all or part of the period of time covered by this indictment, each of the individuals named below has been associated with the designated corporation and has been engaged in post-tension concrete construction in the capacities indicated.

Individual	Capacity	Company
Allan H. Stubbs	President	Western Concrete Structures Company, Inc.
Rene Friedrich	President	VSL Corporation
David Swanson	Vice President	VSL Corporation
Merrill Walstad	Western Division Manager	VSL Corporation
Harold D. Long	President	Atlas Prestressing Corp.

4. Whenever in this indictment reference is made to any act, deed, or transaction of any defendant or co-conspirator which is a corporation or business entity, such allegation shall be deemed to mean that such corporation or other business entity engaged in such act, deed, or transaction by or through its officers, directors, partners, agents, employees, or representatives while they were actively engaged in the management, direction, control, or transaction of its business or affairs.

III
CO-CONSPIRATORS

5. Various persons and firms, not made defendants herein, including Atlas Prestressing Corp. of Panorama City, California, participated as co-conspirators in the offense charged herein and performed acts and made statements in furtherance thereof.

IV
TRADE AND COMMERCE

6. Post-tension concrete construction is used, *inter alia*, in the construction of commercial structures, to add tensile strength to structural framing systems, such as girders, fascia, joists, slab roofs or floors, beams, flat plates, tresses, supporting columns, tension rings and beams.

7. During the period of time covered by this indictment, the defendant corporations and Atlas Prestressing Corp. were invited to submit competitive bids to general contractors and/or owners for the post-tensioning of commercial structures to be constructed in the Southwest United States.

8. During the period of time covered by this indictment, building owners or general contractors in the Southwest United States required a single crew of steel workers to install both post-tensioning and static reinforcing steel.

These steel workers were employed by the post-tensioning company, the reinforcing steel supplier, or a subcontractor known as a "placer." Therefore, the defendant corporations and Atlas Prestressing Corp. were often requested by general contractors or building owners to submit bids coordinated with the bids of the reinforcing steel suppliers.

9. During the period of time covered by this indictment, defendants and Atlas Prestressing Corp. caused a substantial, continuous and uninterrupted flow of steel and other essential materials for use by them in the post-tension concrete construction of commercial structures, including the commercial structures that are the subject of this indictment, in interstate and foreign commerce. The actions of the defendants and co-conspirators in carrying out the offense charged were within the flow of interstate commerce and had a substantial effect on interstate commerce.

V

OFFENSE CHARGED

10. Beginning in or about May 1974 and continuing thereafter into 1976, the exact dates being to this grand jury unknown:

Western Concrete Structures Company, Inc.;
Prescon Corporation;
VSL Corporation;
Rene Friedrich;
Harold D. Long;
Allan H. Stubbs;
David Swanson; and
Merrill Walstad,

defendants herein, and co-conspirators, engaged in a continuing combination and conspiracy to suppress and eliminate competition in the post-tension concrete construction of commercial structures in the Southwest United States in

unreasonable restraint of the above-described trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

11. The aforesaid combination and conspiracy consisted of an agreement, understanding and concert of action among the defendants and co-conspirators, the substantial terms of which were:

(a) to allocate to the corporate defendants and Atlas Prestressing Corp. commercial post-tension concrete construction projects in the Southwest United States;

(b) to submit collusive, noncompetitive and rigged bids on projects for the post-tension concrete construction of said structures.

12. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators have done those things which, as hereinbefore charged, they combined and conspired to do, including, among other things:

(a) attending meetings to discuss and allocate contracts for the post-tension concrete construction of commercial structures in the Southwest United States;

(b) assigning to the defendant corporations and Atlas Prestressing Corp. percentage allocations of the market for post-tension concrete construction of such structures;

(c) exchanging information concerning the amounts or ranges of bids to be submitted for the post-tension concrete construction of such structures;

(d) designating the low bidder for the post-tension concrete construction of such structures;

(e) submitting intentionally high bids or withholding bids for the post-tension concrete construction of

such commercial structures allocated to Atlas Prestressing Corp. or another defendant;

(f) declining to submit post-bid quotations for post-tensioning services at or below the bid price submitted by the designated low bidder;

(g) concealing the allocation of projects and the submission of collusive bids and destroying documents recording meetings at which projects were allocated and the results of said meetings.

VI
EFFECTS

13. The aforesaid combination and conspiracy charged herein has had the following effects, among others:

(a) prices for the post-tension concrete construction of commercial structures in the Southwest United States have been fixed, maintained and established at artificial and noncompetitive levels;

(b) competition in the post-tension concrete construction of commercial structures in the Southwest United States has been restrained, suppressed and eliminated; and

(c) the general contractors and/or owners of said structures and the public generally have been denied the benefits of free and open competition in contracting for the post-tension concrete construction service therefor.

VII
JURISDICTION AND VENUE

14. The aforesaid combination and conspiracy has been carried out, in part, within the Central District of California within five years preceding the return of this indictment.

Dated: February 7, 1980

A TRUE BILL

_____
Foreperson

/s/ Crossan R. Andersen
CROSSAN R. ANDERSEN

/s/ John H. Shenefield
JOHN H. SHENEFIELD
Assistant Attorney General

/s/ Leon W. Weidman
LEON W. WEIDMAN

/s/ Sanford M. Litvack
SANFORD M. LITVACK
Special Assistant to the
Attorney General

/s/ Shelley Taylor Convissar
SHELLEY TAYLOR
CONVISSAR

/s/ Mark Leddy
MARK LEDDY

/s/ Barbara A. Reeves
BARBARA A. REEVES

Attorneys,
U.S. Department of
Justice

Attorneys
U.S. Department of
Justice

/s/ Andrea Sheridan Ordin
ANDREA SHERIDAN
ORDIN
United States Attorney

APPENDIX G
Judgment of Acquittal, Miami.

United States District Court, Southern District of Florida.

Filed: July 17, 1980.

United States of America, Plaintiff, vs. VSL Corporation, Defendant. No. 80-76-CR-CA.

The above-entitled cause having come on for trial and the jury having returned a verdict of not guilty Judgment of Acquittal is entered herein as to the Defendant, VSL CORPORATION, on the one count in the Indictment, it being further

ORDERED AND ADJUDGED that the defendant be discharged to go hence without day for return and exonerated of bond, if any, as to the Count(s) hereinabove specified only, otherwise to remain in full force and effect.

DONE AND ORDERED at Miami, Florida this 17th day of July, 1980, nunc pro tunc April 30, 1980.

/s/ Clyde Atkins
CLYDE ATKINS
United States District Judge

CERTIFICATE OF SERVICE

I Hereby certify that three copies of this Petition were served on the United States on February ...., 1982 by delivering such copies to:

John J. Powers, Esq.
Department of Justice
Antitrust Division
Room 3313
Washington, D.C. 20530

Solicitor General
Department of Justice
Washington, D.C.

I further certify that all parties required to be served have been served and that I am a member of the bar of this Court.

Robert C. Bonner
Attorney for VSL Corporation

Supplemental Brief

81-1565

Office - Supreme Court, U.S.
FILED
FEB 23 1982
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NO. 81-

IN THE

SUPREME COURT OF THE UNITED STATES

VSL CORPORATION

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Tenth Circuit

MOTION OF VSL CORPORATION FOR AN ORDER PLACING PETITION, BRIEF IN OPPOSITION AND RECORD UNDER SEAL*

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* BNA Law Reprints Editor's Note: This motion was denied by the Supreme Court on March 8, 1982, but is included here for completeness.

Petitioner, VSL Corporation ("VSL")[1/], through its counsel, respectfully moves the Court for an order placing under seal VSL's Petition for Certiorari and any brief in opposition to VSL's Petition filed by the government, as well as the record to be certified to the Court.

The Petition seeks review of the judgment of the United States Court of Appeals for the Tenth Circuit on the grounds that VSL's rights under the Double Jeopardy and Due Process Clauses were denied by the government's decision to prosecute VSL five separate times for violation of Section 1 of the Sherman Act. In support of its motion below, VSL submitted several hundred pages of secret grand jury testimony, which was produced by the government, to demonstrate that the government's evidence showed the existence of a single, national conspiracy, rather than separate, regional conspiracies. References to this testimony appear throughout the record below and of necessity are included in the Petition. VSL also anticipates that the government's brief in opposition will make frequent reference to this testimony.

The appellate record below, including the briefs of the parties, was placed under seal by the Tenth Circuit, and

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1/ VSL is wholly owned by Losinger, Ltd., a Swiss Corporation, VSL has no active subsidiaries or affiliates doing business in the United States.

VSL submits that inasmuch as disclosure of grand jury testimony is prohibited by Rule 6(e), F.R.Crim.P., that the Petition, briefs and record herein, should also be placed under seal.

Dated: February 22, 1982

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 22nd day of February, 1982, three copies of Petitioner's Motion for an Order placing Petition, Brief in Opposition and Record Under Seal were mailed, postage prepaid, to:

John J. Powers, Esq.
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Solicitor General
Department of Justice
Washington, D.C. 20530

I further certify that all parties required to be served have been served.

_____
Robert C. Bonner
Counsel for VSL Corporation

Opposition

Supreme Court, U.S.
FILED
APR 14 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1565

In the Supreme Court of the United States

OCTOBER TERM, 1981

VSL CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that the evidence did not support petitioner's contention that the conspiracy charged in this case was part of a larger conspiracy with respect to which petitioner had formerly been placed in jeopardy.

2. Whether the Due Process Clause precludes multiple prosecutions for separate criminal offenses.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1565

VSL CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-5) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 1981. A timely petition for rehearing was denied on January 5, 1982 (Pet. App. 6). The petition for a writ of certiorari was filed on February 22, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On February 21, 1980, a federal grand jury sitting in the District of Colorado returned an indictment

charging petitioner VSL Corporation, two other corporations, and four individuals with one count of violating the Sherman Act, 15 U.S.C. 1, and two counts of mail fraud, 18 U.S.C. 1341, 1342. Petitioner moved to dismiss the indictment on the ground that the Double Jeopardy and Due Process Clauses barred its prosecution in this case. The district court denied the motion to dismiss (Pet. App. 7) and the court of appeals affirmed (Pet. App. 1-5).

1. The Colorado indictment was one of five indictments that were returned by federal grand juries between November 8, 1979 and February 22, 1980. The other indictments were returned in California,[1] Florida and Maryland.

The Sherman Act count of the Colorado indictment charged that defendants had engaged in a continuing conspiracy from approximately January 1975 until approximately November 1977 to suppress competition in the post-tension concrete construction[2] of commercial structures in Colorado and other Rocky Mountain states, by allocating contracts among themselves and by submitting collusive, noncompetitive bids (Pet. App. 11-12). The two mail fraud counts of the indictment charged that the defendants had intentionally devised a scheme to defraud purchasers of post-tensioning materials and services in Colorado

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[1] There were two California indictments naming VSL as a defendant. *United States* v. *VSL Corp.*, Cr. No. 79-913-IH (C.D. Cal., filed Nov. 8, 1979); *United States* v. *Western Concrete Structures Co.*, Cr. No. 80-114-DWW (C.D. Cal., filed Feb. 7, 1980) (see *infra*, note 3).

[2] Post-tensioning is a construction process for reinforcing concrete structures by adding high tensile strength metal tendons into the concrete and tensioning, or stressing, with hydraulic jacks (see Pet. 2).

and the Rocky Mountain states of money and their right to free and open bidding on contracts for these materials and services, and had used the mails in furtherance of such a scheme (Pet. App. 13-17).

While the other four indictments also charged petitioner with violating the Sherman Act by conspiring to rig bids, each indictment involved a different group of conspirators, a different geographic area, different types of post-tensioning jobs or services, and a different time period. Thus, each indictment charged a conspiracy separate and distinct from one another and from the Colorado indictment.[3]

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[3] The first California indictment, *United States* v. *VSL Corp.*, Cr. No. 79-913-IH, charged six corporations, including petitioner, and six individuals with conspiring to allocate contracts for the post-tension concrete construction of highway bridge projects in California, Arizona, and Nevada from approximately 1970 until approximately 1974. It also charged 36 counts of mail fraud.

The second California indictment, *United States* v. *Western Concrete Structures Co.*, Cr. No. 80-114-DWW (C.D. Cal.) (Pet. App. 24-30), charged petitioner, Prescon Corp., Western Concrete Structures Co., Rene Friedrich, Harold Long, Allan Stubbs, David Swanson, and Merrill Walstad, with conspiring to allocate jobs and to submit collusive bids on post-tension concrete construction of commercial structures in the Southwest from May 1974 to 1976.

The indictment in Maryland, *United States* v. *Inryco, Inc.*, Cr. No. Y-80-054 (D. Md., filed Feb. 13, 1980), charged petitioner, Inryco, Inc., Prescon Corp., Stressteel Corp., Richard Watts, and John Keller as defendants. It charged a conspiracy to rig bids for post-tensioning materials and services to contractors in the Eastern states area from at least April 1977 to at least May 1978.

The Florida indictment, *United States* v. *Atlas Prestressing Corp.*, Cr. No. 80-76-CR-CA (S.D. Fla., filed Feb. 22, 1980) (Pet. App. 18-23), charged petitioner, Atlas Prestressing Corp., Charles Adams and Philip Arana with a conspiracy to allocate jobs on commercial structures in the Southeastern United States between 1970 and 1976.

VSL moved to dismiss all the indictments on the ground that the multiple prosecutions violated the Double Jeopardy and Due Process Clauses of the Fifth Amendment. These motions were either denied or still pending when VSL was acquitted of the Florida charges after trial. After the Florida acquittal, VSL abandoned its double jeopardy claims in both California cases and, along with its co-defendants, pleaded *nolo contendere*. In the Maryland and Colorado cases, however, petitioner argued that there had been a single national conspiracy to allocate post-tension concrete projects encompassing the offenses charged in all five indictments and that, therefore, its acquittal in Florida, as well as its *nolo* pleas in California, barred prosecution in Maryland and Colorado. The district court in Maryland denied the motion to dismiss after an evidentiary hearing. *United States* v. *Inryco, Inc.*, [1981-2] Trade Cas. ¶ 64,244 (D. Md. 1981). The court found that the alleged nationwide conspiracy had ended prior to the formation of the separate conspiracy charged in the Maryland indictment and that, in any event, petitioners had not made a prima facie showing that the conspiracies charged in the Florida and California indictments were part of a nationwide conspiracy. The United States Court of Appeals for the Fourth Circuit affirmed this decision and petitioner did not seek review by this Court.[4]

The Colorado district court also denied petitioner's motion. While the court did not issue an opinion, it stated the reasons for its decision during the hearing on petitioner's motion. The court noted that the indictment charged a conspiracy in the Rocky Moun-

[4] The court of appeals' opinion is reprinted in the appendix to this brief. VSL later pleaded *nolo contendere* in the Maryland case.

tain states that began in 1975. Tr. 18, 63.[5] While petitioner contended that this conspiracy actually was part of a single national conspiracy, the court found that petitioner had failed to present any evidence that a national conspiracy existed after 1973. Tr. 18, 63. Moreover, although urged to do so by the district court, petitioner failed to offer any evidence or transcripts from the Florida trial on which its claim of double jeopardy primarily was based.[6] The court concluded (Pet. App. 7):

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[5] "Tr." refers to the transcript of the hearing before the district court on May 23, 1980.

[6] The only evidence that petitioner submitted to the district court in support of its motion was an appendix purportedly containing portions of the transcript of the California grand jury investigation. The United States was not served with a copy of this appendix in the district court and thus was unaware of its existence or its contents. Nor did any reference to an appendix appear in the designation of record for the court of appeals. Thus, the United States did not learn of the existence of this appendix until references to such a document appeared in petitioner's brief in the court of appeals.

When government counsel asked for a copy of the appendix, petitioner refused to serve it or to state precisely what the appendix contained. Petitioner would admit only that the appendix contained excerpts of Los Angeles grand jury materials that the government had formerly served on it in the course of the district court proceedings. (A copy of the appendix was furnished to the government in March 1982, after the instant petition was filed.)

Since both parties were relying on the Los Angeles grand jury testimony in the court of appeals, the United States moved to file with the court a complete copy of the grand jury testimony previously served on petitioner ("Government Appendix"). The court accepted the Government Appendix for filing on October 27, 1980. (Petitioner's assertion, Pet. 6, n.3, in this Court that the court of appeals did not accept the Government Appendix for filing is in error. The court

> I would find that VSL has not met its burden to establish a national conspiracy embracing both Florida and Denver. There is simply no record before this Court which would indicate that any issues of fact or law which are the subject matter of this indictment were on trial in Florida * * *.

2. The court of appeals affirmed. It agreed with the district court "that no facts were established by VSL to demonstrate that there was a national conspiracy to include both Florida and Colorado." Pet. App. 3. After noting petitioner's failure to submit any evidence from the Florida trial (Pet. App. 2), the court turned to petitioner's contention that evidence presented to the California grand jury proved the existence of a single conspiracy that encompassed both the Florida and Colorado indictments (Pet. App. 2). The court found that "the national agreement was an agreement to attempt to agree in the several regions on a division in each area" (*id.* at 3). It concluded, however, that this "nationwide 'agreement' lapsed" before the Colorado conspiracy began for two reasons: (1) a shortage of materials and

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of appeals expressly accepted the Government Appendix, as petitioner acknowledged in its reply brief in the court of appeals, at 13, n.4.) Petitioner thereafter moved to strike portions of the government's brief which referred to the Government Appendix. The court of appeals deferred ruling on the motion until oral argument and directed that the pending motion be brought to the panel's attention at argument. However, petitioner did not pursue the matter at oral argument and the court never ruled on the motion to strike. In any event, as government counsel pointed out at oral argument, support for the government's position could be found in other portions of the record, including the very pages petitioner had included in its own appendix.

uncertainty as to costs, and (2) a letter of warning from an official of one of the corporations that he no longer would participate because of the illegality of the arrangement (*ibid.*). It thus agreed with the findings of the Fourth Circuit in the Maryland case (*id.* at 3-4) that petitioner was not entitled to dismissal of the indictment. The court concluded that whether it applied "the same evidence rule strictly or some variation of it we must hold that on the record before us it is evident the Colorado alleged conspiracy was not part of a larger conspiracy including Florida or California" and that, in any event, the larger conspiracy "had ended before the Colorado conspiracy began" (*id.* at 4-5).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with prior decisions of this Court or any other court of appeals. Accordingly, the highly fact-specific issues raised by the petition do not warrant review by this Court. Although petitioner asserts that a conflict exists among the circuits concerning the burden of persuasion under the Double Jeopardy Clause, the various verbal formulations employed by the courts of appeals are, as we discuss below, functionally equivalent in the context of this case. In any event, petitioner's double jeopardy claim would fail under the standards enunciated by all courts of appeals that have addressed the issue. This case, therefore, presents no occasion for review of petitioner's claim.

1. Contrary to petitioner's contention (Pet. 16-21), the Colorado conspiracy was not part of a single national conspiracy. Rather, the alleged national conspiracy, if it ever existed, ended soon after it began and two years before the Colorado conspiracy was organized. As the court of appeals found (Pet.

App. 3), the alleged attempt to organize a national conspiracy ended because one of the conspirators threatened to expose the agreement [7] and because a 1973-74 national steel shortage made any attempt to agree on an allocation of construction projects impossible.[8] As a result, by the end of 1973, any attempt to organize a national conspiracy had ended in failure and there were no further meetings at which an alleged national agreement was discussed or implemented.[9] Indeed, when confronted with the identical arguments that petitioner makes in this case, the Fourth Circuit also concluded that the alleged national conspiracy had ended by 1974 (App., *infra*, 1a-6a). Thus, even if petitioner can relitigate the question whether the national conspiracy had ended by 1974,[10] there can be no doubt that the na-

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[7] The conspirator took a picture of his competitors at a 1973 meeting and then sent a copy of that picture to each of them along with a letter warning them that their activities were "potentially illegal" and stating that he would not "be associated with these activities." Koons Tr. 61 ("Koons Tr." refers to the grand jury testimony of Bob Koons that was reprinted in the Government Appendix in the court of appeals. See note 6, *supra*). He urged his competitors to seek legal counsel. Koons Tr. 65.

[8] Hoffman Tr. 89, 131-132 ("Hoffman Tr." refers to the grand jury testimony of Sidney Hoffman. See note 6, *supra*).

[9] That there was a national agreement is open to serious doubt. For example, petitioner, one of the major companies in the industry, was not even represented at the 1972 meeting at which it contends an understanding was reached. Hoffman Tr. 55. Moreover, regional meetings held after the 1972 meeting failed to produce effective, enforceable agreements. *E.g.*, *id.* at 114-116.

[10] Under the doctrine of collateral estoppel, "when an issue of ultimate fact has once been determined by a valid and

tional conspiracy ended before the Colorado conspiracy began in 1975.

Moreover, as the court of appeals also found, there is no evidence connecting the Colorado conspiracy with the conspiracies charged in either Florida or California (Pet. App. 3). Indeed, petitioner did not even open its branch office in Colorado until after the alleged national conspiracy meetings had ended (Tr. 70-71). Since petitioner's double jeopardy claim is based on its acquittal in Florida and its *nolo contendere* pleas in California, the finding that there was no connecting evidence is, by itself, fatal to petitioner's contention.

On the facts of record, therefore, the court of appeals properly rejected petitioner's contention that the Colorado conspiracy was part of a larger national conspiracy. There is no need for this Court to review that factual determination, which is of importance only in this particular case. See *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967); *Graver Manufacturing Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949), on rehearing, 339 U.S. 605 (1950); see also *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

2. Petitioner ignores the evidence proving that if the alleged national conspiracy existed, it ended before the Colorado conspiracy began. Rather, petitioner contends that review by this Court is warranted to determine (a) when the burden of persuasion shifts to the government if a defendant claims a violation of the Double Jeopardy Clause (Pet.

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final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe* v. *Swenson*, 397 U.S. 436, 443 (1970). The issue of when the alleged national conspiracy ended was litigated to a final judgment in the Maryland case and petitioner did not seek review by this Court.

7-12), and (b) the standard that should be applied "to determine whether multiple prosecutions for a course of conduct alleged to be separate conspiracies violative of a single statute, is, in fact, based upon a single conspiracy * * *" (Pet. 13). Neither issue, however, warrants review by this Court.

a. Contrary to petitioner's contention (Pet. 9), there is no "significant conflict on the burden of proof issue within the courts of appeals." While petitioner contends that the Tenth Circuit, in contrast to several other circuits, places the burden of proof on a defendant to prove a violation of the Double Jeopardy Clause, that court in fact shifts the burden of proof to the government "where the proof may be in the control of the prosecution, or where it can only be established by the use of Government witnesses." *United States* v. *Rumpf*, 576 F.2d 818, 823 (10th Cir.), cert. denied, 439 U.S. 893 (1978) (Pet. App. 4).[11] Since many defendants should be able to satisfy one of these conditions and thus shift the burden of proof to the government, there is little practical difference between the circuits on the burden of proof question.[12]

In any event, every case relied on by petitioner requires the defendant to make at least a "prima facie" or "sufficient" showing that offenses charged in multiple prosecutions are in law and fact the

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[11] This reasoning is consistent with the reasons given by other courts that have adopted the "shifting burden" rule. See, *e.g.*, *United States* v. *Jabara*, 644 F.2d 574, 576 (6th Cir. 1981); *United States* v. *Stricklin*, 591 F.2d 1112, 1118 (5th Cir.), cert. denied, 444 U.S. 963 (1979).

[12] In this case, petitioner had a Florida trial transcript that it failed to submit to the district court, and it was given a copy of the California grand jury transcript by the government. Thus, it had access to the evidence relevant to assessing its claim of double jeopardy.

same.[13] Only if such prima facie case is established is there a need for the government to come forward "to rebut the inference of unity." See, *e.g.*, *United States* v. *Papa*, 533 F.2d 815, 821 (2d Cir.), cert. denied, 429 U.S. 961 (1976). Here, the district court and the court of appeals found that VSL had not made even a prima facie showing that a national conspiracy comprising both Florida and Colorado existed. Tr. 18, 63, 68-69, 77; Pet. App. 3. Since VSL made "no showing" and established "no facts" (Pet. App. 3) that create an inference of a national conspiracy, the burden of proof never shifted to the government to rebut petitioner's allegations.[14]

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[13] The rule is not phrased in identical terms in all circuits, but it is essentially the same. The Third, Fifth, and Sixth Circuits require the defendant to make a prima facie nonfrivolous claim of double jeopardy. The "burden of persuasion" then shifts to the government. *United States* v. *Inmon*, 568 F.2d 326, 329 (3d Cir. 1977); *United States* v. *Stricklin*, *supra*, 591 F.2d at 1117; *United States* v. *Jabara*, *supra*, 644 F.2d at 576. The Second and Eighth Circuits call for defendant to introduce "sufficient" evidence that two conspiracies in fact are one; then the burden shifts to the government to rebut the inference of unity. *United States* v. *Cambindo Valencia*, 609 F.2d 603, 624 n.19 (2d Cir. 1979), cert. denied, 446 U.S. 940 (1980); *United States* v. *Tercero*, 580 F.2d 312, 315 n.12 (8th Cir. 1978). See also *United States* v. *Castro*, 629 F.2d 456, 466 (7th Cir. 1980) (Fairchild, Ch. J., concurring). The Ninth Circuit has stated that, once the defendant makes a nonfrivolous showing of double jeopardy, the government must come forward with rebuttal evidence. The court noted that, whether characterized as a burden of "going forward with evidence," or as a burden of persuasion, the effects are the same. *United States* v. *Bendis*, 657 F.2d 1025, 1029 (9th Cir. 1981) (after publication in the advance sheets, the opinion was withdrawn from the bound volume during the pendency of a rehearing petition).

[14] Indeed, in the district court, petitioner agreed that the burden of proof was on it. Tr. 64. It did not argue otherwise

Finally, even assuming that the government had the burden of proof in this case, petitioner's claims of double jeopardy still should be rejected. The evidence fully supports the government's contention that even if there was a national conspiracy, it ended before the Colorado conspiracy began, and there was no connection between the Colorado conspiracy and any prior or subsequent conspiracy. Indeed, in the Maryland case in which petitioner made these identical arguments concerning the existence of a national conspiracy, the court expressly held that the government had the burden of proof; it then concluded that the government had fully satisfied that burden. *United States* v. *Inryco Inc.*, *supra*. Thus, there is no need to consider the burden of proof issue in this case.

b. Contrary to petitioner's contention, neither the district court nor the court of appeals relied exclusively on the "same evidence" test in rejecting its double jeopardy claims. The district court expressly directed petitioner to point to "evidence which would indicate to me [the Florida conspiracy] was part of a national conspiracy and evidence that this case here is part of a national conspiracy. *It doesn't have to be the same evidence*" (Tr. 70; emphasis added).[15]

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until it filed its brief in the court of appeals. As a result, the district court never had the opportunity to consider the argument that the burden of proof should be placed on the government.

[15] The district court also stated (Tr. 18):

> * * * I think everybody agrees factually that if there is one conspiracy, national in scope, and if the Florida trial was for that national conspiracy and if the Denver trial is also a part of that same national conspiracy, in that case the double-jeopardy motion to dismiss is good, is proper, and it raises a factual issue. From what I can find in looking at what was presented to the Court, it ap-

Similarly, the court of appeals stated that, whether it applied "the same evidence rule strictly or some variation of it we must hold that on the record before us it is evident the Colorado alleged conspiracy was not part of a larger conspiracy including Florida or California." Pet. App. 4-5. Since, as the court of appeals found, petitioner's claim of double jeopardy must be rejected regardless of the test applied, there is no occasion in this case for the Court to determine which test is appropriate.

3. Petitioner also contends that the Due Process Clause prohibits multiple prosecutions for "the same course of conduct * * *" (Pet. 24). But even if petitioner may seek appellate review of such a

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peared to me from all the papers that this indictment here in Denver charges a conspiracy beginning in 1975; that if there was any sort of a national conspiracy based on testimony before the Grand Jury, it is clear that that national conspiracy ceased to be in 1973. I don't want to hear matters concerning a national conspiracy which ceased in 1973, if we are talking about a 1975 Denver or Colorado or Rocky Mountain Region conspiracy.

Now, the defendants, from what I can see, have submitted no evidence from the Florida trial to indicate that the issues of law and fact determined there are determinative of what is to be determined here. If there is such evidence, I missed it; so unless there is some evidence offered that there is a national conspiracy in 1975, of which both Denver and Florida are a part, this motion should also be denied.

Moreover, at the hearing in the district court, petitioner's counsel conceded "that the Court has correctly phrased the issue that is presented by this double-jeopardy motion * * *" (Tr. 64), *i.e.*, "whether VSL Corporation has presented evidence or whether that evidence shows that there was a conspiracy national in scope of which the Florida conspiracy was a part and of which the Denver conspiracy * * * was a part" (*ibid.*).

general due process claim in the absence of a final judgment of conviction (see App., *infra*, 6a; cf. *Abney* v. *United States*, 431 U.S. 651, 663 (1977)), the claim is without merit. Since each of the indictments against petitioner charged a separate and distinct criminal offense,[16] and since these separate and distinct offenses did not arise out of the "same transaction" (cf. Pet. 25-29 and cases cited therein), the Due Process Clause does not prohibit separate prosecutions. *United States* v. *H.E. Koontz Creamery, Inc.*, 232 F. Supp. 312, 323 (D. Md. 1964).[17] Therefore, there is no reason to review petitioner's due process claim.[18]

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[16] Indeed, in three of the cases in which it was indicted, petitioner entered pleas of *nolo contendere* that admitted every essential factual allegation in those indictments. 1 C. Wright, *Federal Practice and Procedure* § 177 (1969). Since each of those indictments charged a separate conspiracy, petitioner may not now "contest the factual and theoretical foundations of the indictment[s] to which [it] pleaded, so as to show that, in fact, [it] committed only a single offense." *Kerrigan* v. *United States*, 644 F.2d 47, 49 (1st Cir. 1981).

[17] Petitioner has tendered no evidence of bad faith on the government's part. Cf. *United States* v. *Thomas*, 593 F.2d 615, 624 (5th Cir.), modified on other grounds, 604 F.2d 450 (1979). Indeed, petitioner's attorney met with Department of Justice officials before the indictments in these cases were returned and argued that there was no evidence of a single national conspiracy. Counsel stated that the industry's marketing techniques in the various regions of the United States were so distinct that no unified national market allocation program was possible. Government's Opposition to Motion to Dismiss Indictment 1-2; Andersen Affidavit appended to Government's Opposition to Motion to Dismiss Indictment.

[18] Although Rule 8(a), Fed.R.Crim.P., permits the government to join separate offenses for crimes of the same or simi-

4. Finally, both petitioner's double jeopardy and due process arguments ignore the fact that counts two and three of the indictment in this case charge petitioner with violating 18 U.S.C. 1341 in connection with "a scheme and artifice to defraud purchasers of post-tensioning materials and services in Colorado and other Rocky Mountain states * * *." Pet. App. 14. Since mail fraud and a violation of the Sherman Act are separate criminal offenses (*United States* v. *Azzarelli Construction Co.*, 612 F.2d 292, 298 (7th Cir. 1979), cert. denied, 447 U.S. 920 (1980)), petitioner can be charged with both crimes. Thus, petitioner is not entitled to dismissal of these two counts of the indictment even if its contentions concerning the scope of the Sherman Act conspiracy are correct.

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lar character in one indictment, it does not require it to do so. *United States* v. *Rabbitt*, 583 F.2d 1014, 1021 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979); 8 *Moore's Federal Practice* ¶ 8.05[1] (2d ed. 1981). Here joinder would have been impractical and burdensome, since each conspiracy involved different witnesses, different proof, and multiple and varying defendants. Moreover, contrary to VSL's assertions (Pet. 29), since Rule 18, Fed.R.Crim.P., requires a criminal trial to be held in the district where the offense was committed, the government, absent a waiver, could not have joined all these offenses since they were committed in different districts. Finally, since the separate offense charged in each of the indictments was the result of a separate conspiracy and did not arise out of a "single transaction," multiple prosecutions are not contrary to Department of Justice policy as described in *Petite* v. *United States*, 361 U.S. 529, 530 (1960).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1982

Appendix

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-5143

UNITED STATES OF AMERICA, APPELLEE

versus

VSL CORPORATION, APPELLANT

Appeal from the United States District Court
for the District of Maryland, at Baltimore

Joseph H. Young, District Judge

Argued January 8, 1981 Decided June 5, 1981

Before WIDENER, HALL and PHILLIPS, Circuit Judges.

PER CURIAM:

VSL Corporation was charged in five indictments with participating in separate regional conspiracies in violation of § 1 of the Sherman Act, 15 U.S.C. § 1. After being acquitted in one of the cases and pleading *nolo contendere* in two others, VSL moved in this case to dismiss the indictment on the grounds

that it was barred by the Double Jeopardy Clause and violated due process. VSL appeals the district judge's denial of its motion to dismiss. We affirm.

VSL and the other defendants in this case are engaged in marketing post-tensioning engineering and materials to construction contractors and builders. Post-tensioning is a method of adding structural strength to concrete buildings by embedding high tensile steel tendons in conduits into concrete and tensioning it with hydraulic jacks. VSL markets post-tensioning materials on a nationwide basis.

In November 1979 and February 1980, the Antitrust Division of the Department of Justice secured indictments of VSL and other post-tensioning companies in California, Colorado, Florida and Maryland, charging them with conspiracy to unreasonably restrain competition by allocating post-tensioning services and rigging bids in violation of § 1 of the Sherman Act.[1] Before being brought to trial on any of the indictments, VSL moved to dismiss all the indictments on double jeopardy and due process grounds or in the alternative to have the Government elect one indictment on which to proceed. The motions in all five cases were denied. In the instant case involving the Maryland indictment, the district court denied the motion without prejudice on the ground that jeopardy had not yet attached in any of the cases.

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[1] The five indictments are: *United States* v. *Inryco, Inc., et al.*, CR Y-80-054 (D. Md.); *United States* v. *Prescon Corporation, et al.*, 80-CR-49 (D. Colo.); *United States* v. *VSL Corporation, et al.*, CR 79-913-IH (C.D. Cal.); *United States* v. *Western Concrete Structures Company, Inc., et al.*, CR-114-DWW (C.D. Cal.); and *United States* v. *Atlas Prestressing Corp., et al.*, 80-76-CR-CA (S.D. Fla.).

The indictment in this case was returned by a grand jury sitting in the District of Maryland on February 13, 1980. It names four corporations, VSL Corporation, Inryco, Inc., Prescon Corporation and Stressteel Corporation, and two individuals, John Keller of Prescon and Richard Watts of VSL. The indictment charges that, from at least April 1977 until May 1978, the defendants and others combined to allocate certain post-tensioning projects in the Eastern States Region[2] which were bid from their offices in Maryland, Pennsylvania and Virginia, and to submit collusive, noncompetitive bids to contractors in the Eastern Region. The alleged effect of the conspiracy was the artificial inflation of prices of post-tensioning materials and services in the area and restraint of competition.

Jeopardy first attached in the Florida action. After a nine-day trial, the jury returned a verdict of acquittal, which was entered on May 12, 1980. In addition, VSL has pleaded *nolo contendere* in the two California cases. Following the acquittal in Florida, VSL renewed its motion in the instant case to dismiss.[3] After taking two days of testimony the district court denied the motion.

Essentially, VSL claimed in its motion that the conspiracies charged in five separate indictments—

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[2] The alleged market allocation in these cases was apparently done regionally using a zone map already in use in the industry for legitimate business purposes. The Eastern States Region, on the zone map, is Region IV, including East Coast states north of North Carolina.

[3] The other defendants in this action, with the exception of John Keller, entered pleas of *nolo contendere* to the one-count indictment on July 14, 1980. Keller had previously entered a plea of guilty.

or at least four of them [4]—were, in fact, a single national conspiracy to allocate the market, implemented on a regional basis. Several of the companies—VSL, Prescon and Atlas—marketed post-tensioning materials on a nationwide basis, while others operated only within certain regions of the country. VSL was indicted in all five indictments while Prescon was indicted in four and named an unindicted coconspirator in the other.

The evidence presented to the district court during the hearings on the motion, including grand jury testimony, affidavits and live testimony,[5] showed that there were some efforts within the post-tensioning industry in the early 1970s to implement a national agreement to allocate post-tensioning work on a regional basis. The district court found that this activity was a conspiracy and had developed in the course of meetings of the Post-Tensioning Materials

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[4] Four of the indictments charge conspiracies to allocate commercial projects while the fifth—*United States* v. *VSL Corp., et al.*, No. 79-793-IH (C.D. Cal.)—charges a conspiracy to allocate highway bridge projects. Although initially VSL argued that all five were a single conspiracy, in their Reply Brief the argument appears to include only the four commercial conspiracies charged. *See* Reply Br. at 14 & n.7.

[5] In support of its Renewed Motion to Dismiss, VSL submitted the grand jury testimony of twelve witnesses. The district court considered affidavits of six individuals who were present for cross-examination at the hearing. Among the individuals whose grand jury testimony and affidavits were considered were representatives from these companies: Prescon, Western Concrete Structures, L.R. Yegge Co., Stressteel, Inryco, Atlas Prestressing Corp., American Stress Wire, Noble Enterprises, and VSL. The witnesses who testified at the hearing included representatives of Prescon, Inryco and Stressteel, VSL's codefendants in the Maryland action.

Fabricators Committee (PTMFC) of the Prestressed Concrete Institute (PCI), an industry trade association. At these meetings it was decided that the market would be allocated and that these plans would be implemented regionally, using a zone map already in use for reporting and statistical purposes.

The evidence also showed, and the district court so found, that regional follow-up meetings took place during 1972 and 1973, in all regions including the Eastern Region that is the subject of this indictment. Nonetheless, the district court found that there was no connection between this national conspiracy with its regional follow-up activity and the conspiracy alleged to have taken place in the Eastern Region in 1977 and 1978. The court found that the national conspiracy had ended by 1974 because of widespread cheating, the 1973 steel shortage and a letter warning that these activities were illegal sent from a representative of one company to all PTFMC members in 1973. From 1974 to 1976, the court found, there were no regional or national meetings, and the market had become very competitive as of 1976. Further, the court found that the conspiracy charged in the Maryland indictment arose independently of the national conspiracy and subsequent to its breakdown.

These factual findings are critical to the district court's ultimate legal conclusion that the Maryland prosecution was not barred by double jeopardy. We can reject the findings only if we are prepared to declare them clearly erroneous. *See United States* v. *Lawrenson*, 298 F.2d 880, 887 (4th Cir. 1962). On a careful review of the double jeopardy plea record, we cannot so conclude and indeed find them supported by substantial evidence. These findings in turn fully support the district court's legal conclusion

that the conspiracy here charged is separate from any other as to which jeopardy had attached for VSL. Accordingly, we affirm that conclusion.

On this appeal VSL also attempts to challenge the district court's rejection of its claim that the prosecution should be barred because the multiple simultaneous indictments violated its due process rights. We consider that ruling not properly before us on this interlocutory appeal, and consequently express no view upon it. *Compare Abney* v. *United States*, 431 U.S. 432 (1977) (interlocutory denial of double jeopardy claim appealable) *with United States* v. *MacDonald*, 435 U.S. 850, 862-63 (1978) (interlocutory denial of speedy trial claims not appealable.)

AFFIRMED.

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Petitioner's Reply Brief

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No. 81-1565

IN THE

Supreme Court of the United States

October Term, 1981

VSL CORPORATION,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION.

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Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION.

Prefatory Statement.

In pursuit of its statistical holy-war against VSL and evidently unsatisfied with four simultaneous prosecutions of Petitioner, the Antitrust Division is pushing to force VSL to run the trial gauntlet a fifth time; this time in Denver.

Respondent has strained mightily in its Brief in Opposition to portray this case as "factually specific" and as a matter of no national consequence. The effect is initially compelling, but it is based on a distortion of the record below and a truly elastic and unfair interpretation of the law relating to conspiracy, collateral estoppel and double jeopardy. By this Reply VSL responds to the most important issues raised in the government's brief.

The Circuit Courts Are in Conflict on the Burden of Proof Issue With the Tenth Circuit in the Minority Position.

Respondent's argument that there is no significant conflict on the burden of proof issue is impossible to square with the actual holding of the court below and the reported decisions in other circuits. The Tenth Circuit *stated* in its opinion that the burden was on the defendant advancing a double jeopardy argument. (Petition at A-4). The fact that the court, at the conclusion of a string citation of cases placing the burden on the criminal defendant made a cryptic reference to *United States v. Rumpf*, 576 F.2d 818 (10th Cir.), *cert. denied*, 439 U.S. 893, 99 S.Ct. 251 (1978), where in *dictum* the court stated that the burden may shift, does not change the fact that the court below cited the case for the proposition that the burden rests with the defendant. Nor can the respondent's attempts to reconstruct the opinion below change the fact that the only way the Tenth Circuit could have affirmed the district court's decision was to place the burden on VSL. This conclusion follows because the government did not provide *any* evidence in the district court to rebut VSL's showing that the government had broken one national conspiracy into several.[1] The only way to rationalize the district court's decision and the Tenth Circuit's affirmance is to recognize that both courts placed the burden on VSL. That is inconsistent with the rule in the Second, Third, Fifth, Sixth and Eighth Circuits[2] and warrants review by this Court.[3]

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[1]The government does not dispute this in its Brief in Opposition. It seeks to obscure the issue by referring to the Appendix of Grand Jury Testimony it submitted to the *Court of Appeals*. What it ignores is that this evidence was not before the district court.

[2]See cases cited at p. 8 of the Petition.

[3]The government grossly overreaches when it cites a *concurring opinion* in *United States v. Castro*, 629 F.2d 456 (7th Cir. 1980) to align that circuit with the others. As the majority opinion in *Castro* makes clear, the burden is on the defendant in the Seventh Circuit. 629 F.2d at 461. The Seventh and Tenth Circuits are thus at odds with those referred to above on this issue.

VSL Made a Non-Frivolous Showing of Double Jeopardy in the District Court Which Was Not Overcome by the Government; Under the Majority and Better Rule It Was Entitled to Dismissal.

VSL submitted evidence in the district court, in the form of the government's grand jury testimony, showing the existence of a national conspiracy in the post-tension industry. The government, in its brief in opposition argues that the decision below was proper because the evidence supports the government's contention that the national conspiracy ended before the conspiracy alleged in Colorado began. (Br. p. 12).

As pointed out above, however, the government submitted no evidence at all in the district court. Respondent attempts to finesse this point by referring to the Maryland action where, after an evidentiary hearing lasting several days, the court concluded that there was a national conspiracy and that the conspiracy alleged in the Maryland indictment was separate from the national agreement. However, the Maryland hearing was held several weeks after the hearing in the district court in this case and involved an actual evidentiary showing by the government that the Maryland prosecution was not for the same conspiracy that had been in issue in Miami, where VSL was previously acquitted.

Surely the government cannot seriously argue that the Maryland court's decision, which was rendered *after* the decision of the district court below and which involved a conspiracy that the government itself insists is *separate* from that alleged here, operates as a collateral estoppel in this action where the government adduced no evidence at all to support its position that the Colorado conspiracy was severable from any national conspiracy. The government can-

not rely on its subsequent actions in other cases to cure the deficiencies in the case it presented in the court below.

Moreover, even the belated evidence it did submit, the appendix of grand jury testimony, was submitted to the wrong court and in an incompetent manner. It was not the place of the Court of Appeals to take evidence on the factual issue that should have been decided by the district court.[4] Moreover, grand jury testimony elicited by the government without the opportunity for VSL to cross-examine those witnesses, was inadmissible hearsay. Fed. R. Evid. 801, 802.

In the absence of evidence from the government that VSL withdrew from the national conspiracy, it was error for the Courts below to conclude that the conspiracy charged in the indictment was separate from the conspiracy for which VSL has already been placed in jeopardy in Miami. The withdrawal doctrine requires the defendant to provide proof of affirmative acts by which his participation was terminated. *United States v. United States Gypsum Co.*, 438 U.S. 464-65, 98 S.Ct. 2864 (1978). In the case at bar the burden of proof of withdrawal was squarely upon the government, because, in the double jeopardy context, the roles of the accused and the government are reversed. See *United States v. Stricklin*, 591 F.2d 1112, 1121 (5th Cir.), *cert. denied*, 444 U.S. 963, 100 S.Ct. 449 (1979).

There can be no doubt that if the government had been prosecuting VSL for participation in a national conspiracy

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[4]The government's argument that it did not become aware of VSL's appendix until the opening brief in the Tenth Circuit is false. An identical appendix was served on the government's attorneys in both the Baltimore case and the Los Angeles case. Moreover, the appendix was referred to in VSL's Reply Memorandum in the District Court. At that time, the government had the opportunity to produce evidence at the hearing rebutting the grand jury testimony, but it chose not to do so.

between 1972 and 1974 VSL's defense on the statute of limitations would be opposed vigorously by the government under this doctrine. *Cf. U.S. v. Inryco*, 641 F.2d 290 (9th Cir. 1981), *cert. dismissed*, ... U.S. ...., 102 S.Ct. 1045 (1982). Certainly the government's position would be that the Denver conspiracy amounted to overt acts in furtherance of the original national conspiracy. The burden would be on VSL to show abandonment of the original conspiracy.

This same rule should have required the government to show affirmatively that the national conspiracy, which it admits extended through 1974, was terminated rather than merely latent until 1975 when the Denver conspiracy was alleged to have begun. In light of the geographic and temporal breadth of the conspiracies which the government itself alleged in its five indictments against VSL, it is difficult to see how that burden could have been carried. In any event, it was not carried and the indictment against VSL should have been dismissed.

Conclusion.

This case starkly and clearly presents this Court with an opportunity to resolve several important Constitutional questions affecting the rights of criminal defendants to be free from multiple, simultaneous prosecutions for actions that are part of the same conspiracy. The Petition for a Writ of Certiorari to the Tenth Circuit Court of Appeals should be granted.

Respectfully submitted,

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